86-912

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION and SPRINGFIELD DRIVE-INS, INC.,

Petitioners,

v.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit's *de novo* review and reinterpretation of the facts usurped the jury's role as factfinder, violated the Seventh Amendment and raises an important constitutional question concerning the standard of review appellate courts should utilize in reviewing denials of motions for judgment notwithstanding the verdict, there presently being a conflict among the circuits on such standard?

2. Whether the Seventh Circuit erred when it concluded, as a matter of law, that no representations of present fact were made nor did a confidential relationship exist under Indiana law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion and judgment of the Seventh Circuit, at App. 1a, which reversed the district court's unreported order denying defendants-respondents'[1] motion for judgment notwithstanding the verdict, at App. 32a. The Seventh Circuit's opinion was issued July 29, 1986, 797 F.2d 1403, and judgment was entered the same day. App. 43a.

Plaintiffs-petitioners' petition for rehearing and suggestion for rehearing in banc was denied by the Seventh Circuit on September 9, 1986. 797 F.2d 1403. App. 44a.

The jurisdiction of this Court is based upon 28 U.S.C. §1254.

RELEVANT CONSTITUTIONAL SECTIONS

This petition involves petitioners' right to a trial by jury under the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF CASE

This lawsuit was filed in 1982 by petitioners Al Vaughn, Marjorie Vaughn, Algon Corporation and Springfield Drive-Ins, Inc. ("the Vaughns") who were franchisees of Burger Chef Systems, Inc. The defendants were General Foods Corporation ("General Foods"), Burger Chef Systems, Inc.

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[1] All of the present parties to this case are named in the caption in this Court. Hardee's Food Systems, Inc. was dropped as a defendant through an Agreement of Settlement in 1983. Neither Algon Corporation nor Springfield Drive-Ins, Inc. have parent companies, subsidiaries or affiliates.

("Burger Chef") and Hardee's Food Systems, ("Hardee's"). The lawsuit was precipitated by the announcement in December 1981 of an agreement by General Foods, then the parent of Burger Chef, to sell the hamburger fast food chain to Hardee's. The original complaint alleged that defendants had violated the federal antitrust laws, had breached their fiduciary duties and fraudulently misrepresented their intentions as to the franchise system. Federal jurisdiction was, thus, based upon a federal question, diversity among the parties and pendent jurisdiction.

Through an Agreement of Settlement, Hardee's was dropped from the lawsuit. On June 30, 1983, an Amended Complaint was filed which contained claims against General Foods and Burger Chef, respondents herein, for breach of contract, breach of fiduciary duty, fraud, and punitive damages.

STATEMENT OF FACTS

A. Respondents' Failure To Disclose Key Business Decisions Affecting The Franchise System.

During the years between the acquisition and sale of Burger Chef, respondents failed to disclose and misrepresented to the franchisees, including the Vaughns, their presently existing business decisions concerning Burger Chef. This section describes those undisclosed decisions chronologically.

1967-1977

In 1967, Burger Chef was a profitable hamburger fast food system. It was second only to McDonald's nationally, operating through a combination of franchised and com-

pany-owned restaurant units. E9, E1.[2] Burger Chef then had about 1,000 units; McDonald's had about 1,100-1,200 units; Burger King had about 300-350 units; and Wendy's had not yet entered the market. B75-76.

The Vaughns had been Burger Chef franchisees since 1963, and by 1967 they were operating five units in the St. Louis market area. B71-72. In 1970, the Vaughns opened a sixth St. Louis unit which had previously been owned and operated as a company store. B142. The Vaughns initial investment in their first franchise unit was about $150,000; their investment subsequently rose to about $350,000, due to modernization and equipment change. B73.

In 1968, General Foods entered this "rapidly expanding field" by acquiring the entire Burger Chef System for $16 million. E12. From 1968 to 1972, General Foods had significant problems and in 1972 was forced to write down millions of dollars of assets.

General Foods was aware, in 1971, that there was little likelihood of Burger Chef ever achieving long-term performance in line with overall General Foods' profit objectives. A163, A210. Continued ownership was deemed undesirable because it would require ongoing General Foods management attention "for increasingly diminishing returns" over time; involve General Foods in the day-to-day management of a business it did not know; and entangle it in contractual obligations to franchisees it did not want. E109, E119, A87.

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[2] References to the record on appeal to the Seventh Circuit are designated as follows: references to items in Plaintiffs' Appendix are denoted by "B"; references to Plaintiffs' Appendix of Exhibits are denoted by "E" and refer to the first page of the exhibit; and references to Defendants' Appendix follow their "A" designations. "PX" refers to trial exhibits of plaintiffs not reproduced in the appendices. "Tr." refers to the trial transcript.

General Foods, therefore, decided to sell Burger Chef. B214, B298; E9. Secret discussions were held with interested parties "including other large chain operators" about the sale of the entire Burger Chef operation, but no buyer was found who was willing to pay the asking price. A87.

From then on, General Foods made a series of decisions and took conscious actions to "window dress" the System and "organize [it] for sale." A87, E119, E135, A163.

General Foods designated its policy as one of "liability minimization" for Burger Chef. E18. Under this strategy, there would be no new unit growth, no investment on the franchise side of the business, a minimal or "low investment posture" on the overall business, and a planned sale date of the System targeted for 1981. E18, E102; B11, B234; PX 633. Burger Chef would be run to "manage the loss": no "substantial capital investments" would be made in the business, and there "would be no dollars available from the company to develop franchise markets." E106; B10-11, B22, B33-34, B37. The net impact of these "conscious management actions" caused the System to have an overall "lower [market] penetration" and a reduction in the "percentage of burgers sold." B166; E106.

Respondents also began actively requiring releases and new franchise agreements as a matter of policy from old and new franchisees at about this time. E4. Managers were instructed to use and did use deception to force the franchises to sign the releases. B50-51, B138, B139. Respondents also used side notes to avoid releasing any liabilities franchisees had to them. B53.

General Foods "deliberately" decided to "curtail franchising" and focus attention only on company stores. E12, E172. By its terms, "liability minimization" foreclosed any General Foods financial assistance to its franchise community. B10-11.

Investment in all segments of the business by a large company had become a necessary element of a fast food

franchise system's ability to compete, "expand" and "succeed." E102; B245-47. The decision to "manage the loss," however, precluded any such investment in Burger Chef and instead dictated a deliberate "low investment" posture. As of 1972, the System needed "hundreds of millions" of dollars of capital infusion to maintain it. B298. Not only did General Foods not make anywhere near the investment of the magnitude it knew was required, but, contrary to its express and implied representations, it had decided not to make any such investment. B24-25, B46, B61.

Like investment, a commitment to growth was known to be essential to a fast food hamburger restaurant in the 1970's. The hamburger fast food market grew rapidly from 1971 through 1978, "largely due to new units." E25. New unit growth for Burger Chef, however, was antithetical to "liability mtion." Deliberate system contraction was planned and ourred. *Id.*; E58.

These conscious no-growth, no-investment, no-assistance, anti-franchise plans and strategies resulted in a "rapid decline" in Burger Chef market share. E18. In addition, in the aggregate, company stores were "operating at a loss, as sales per store were less than for . . . [franchise] stores and sales per store were declining at a time when competitors' sales per store were climbing rapidly." E172. E25; B218.

The Vaughns' market area, St. Louis, was known to be particularly susceptible to accelerating performance deterioration as a result of "continuing historical levels of non-support." B236-37. Outside consultants warned General Foods that such conscious actions placed the entire System at an undesirable level of risk. *Id.*

Toward the end of 1977, after internal and external assessments of the System and the impact of its liability maximization policies, General Foods knew it still did not

have a System and Burger Chef was a business "no one wanted." B174; E101. As of that time, General Foods was looking for anyone, given the appropriate tax considerations, just to "take the entire Burger Chef business—including the Fiscal 1972 loss provision—off of General Foods' hands." B300; E51.

None of these business decisions were revealed to the Vaughns and other franchisees, although at the same time they were making decisions concerning their own investments in Burger Chef.

1978-1981

In 1978, General Foods hired the first executive from outside its organization as President of Burger Chef, Terry Collins. Collins became both President of Burger Chef and Vice President of General Foods. Presentations concerning the state of the Burger Chef System, its plans, strategies and targets, however, were made to the Finance Committee of General Foods without the knowledge or participation of Collins or anyone else in the Burger Chef organization. The Finance Committee directed that General Foods' investment in the franchise segment of the business be decreased and no new store capital appropriations for any aspect of the System were planned for 1981. Collins claimed he had no knowledge of either decision. B270-72.

In April of 1978, there was a meeting of all Burger Chef managers at which they were unequivocally told that respondents would continue to operate Burger Chef pursuant to the policy of "liability minimization" and that their jobs were still to "manage the loss." The managers were informed General Foods had absolutely no intention of committing to the System or the franchisees. B48.

Management actions toward the sale of the System accelerated. In August 1978, a General Foods senior vice president authored a document under the title "Project

Beethoven," which was adopted by General Foods as the code name for its secret plan to sell the System. E164.

In late 1978, pursuant to "Beethoven," the Finance Committee sought the advice of outside consultants, Goldman, Sachs, on selling the System. E66. Goldman, Sachs advised that although the System was saleable as of 1979, the "logical time to consider sale" was after 1981. *Id.*

In September 1978, the Finance Committee reconfirmed the target date for sale for the end of 1981. E58. Under the 1978-82 five-year plan, General Foods would do nothing for the franchisees. E94. This decision was implemented. Key marketing strategies and investments in the earlier period were focused on the company side of the business, to the direct exclusion of the franchisees. No General Foods or Burger Chef investment or media spending for the franchise community were to be made. "Pains" were taken to separate franchise and company strategies. E82. The Finance Committee decided to manage the franchise segment in order to decrease respondents financial exposure. E141, E58, A145. These undisclosed practices had "real world" "numerous negatives" for the franchisees and were inimical to the "viability" of the "total enterprise." E82, E119.

Conscious management decisions "delayed" franchise programs and denied franchise new unit growth or expansion. E87. These decisions weakened "franchise operators" and caused the "franchise sector" to deteriorate even "far more" than General Foods planned. *Id.* General Foods also rejected all proposals for financial assistance to franchisees.

From 1978 until 1981, the System continued to deteriorate. By this time, the System had fallen well behind the three major hamburger fast-food chains in average sales per unit. A163. The System had fewer sales, higher operating costs, and lower profits than any of its direct major competitors. E119. B167-68.

At the direction of the Finance Committee, there were to be "no new Burger Chef outlets" for Fiscal 1981; there would be "no new capital store appropriations" for Fiscal 1981; there would be "minimal additional investment" in Fiscal 1981 even as to company stores, and the policy of no investment for the franchise segment of the business would continue. E85, E87, E119, A145. Burger Chef managers virtually stopped contact with franchisees. B59-60.

Once again, none of these critical decisions were revealed to the franchisees and, in fact, actions were taken to affirmatively conceal these decisions from the franchisees, as hereinafter set forth.

B. Respondents' Affirmative Misrepresentations To The Franchisees.

General Foods knew it was necessary to conceal its decisions to organize the System for sale. It was well aware of the "persistent" questioning by franchisees of its commitment to them and to the System, E18; B254, and knew that before franchisees would invest "the kind of money" it was asking after 1971, it would have to say something about its present decisions concerning the business. B254-55, B34, B37. In order to maintain the trust and confidence of the franchisees and induce them to make continued and increased investments in the System, General Foods made affirmative misrepresentations to the franchisees.

1971-1977

During the years from 1971 to 1977, General Foods told the franchisees it was committed to them and the success of the franchise segment of the business. B14, B37-38, B47, B88. As used by General Foods, "commitment" was an expression of "present and ongoing intention." B212-13. "Commitment" was meant to reflect then-existing "plans," "targets," "investments," and "goals" for the System. B212. General Foods told the Vaughns and other

franchisees that they were "partners" with General Foods and Burger Chef in the business. In direct contradiction to the truth, General Foods stated there were no strategies for the company sector which were different from or antagonistic to those for the franchise sector. *Id.* A67, E46.

General Foods represented it intended to provide financial support to franchisees for new unit growth which General Foods knew was critical to the maintenance and success of the business. B43; E18.

General Foods and Burger Chef represented they were committed to providing the investment necessary to the operation of the System and that their resources would be used for such investments. B77-78; A224.

General Foods represented Burger Chef was a strong, viable company. B153. For example, General Foods represented the company side of the business was profitable when, in fact, it was not. PX762. From 1972 on, Burger Chef was always in a "weak financial position," E18; B339, which was dictated in principal part by General Foods' tax considerations. E32, E35.

1978-1981

By late 1977, Burger Chef was not attractive enough to sell. General Foods continued to need the franchisees to front for the System. General Foods had to have the franchisees' trust in order to secure their continued and increased investment in their side of the business until the secret target sale date.

In April 1978, at a franchise convention, respondents revealed what they represented to the franchisees were the new decisions and strategies for the System. Respondents told the franchisees they would do "whatever it takes" in the way of "restaurant facilities" and "equipment;" "market identity;" "advertising;" "promotions;" "products;" and "system growth" to make the business

succeed. E55. Respondents represented to the Vaughns and the other franchisees that these new decisions and strategies were "more than a promise—[they were] a ratification of commitment. . . ." *Id.* Nothing less than "total commitment" was "asked" of the franchisees, and "nothing less than total commitment" was "pledged" by respondents. *Id.*

In furtherance of their "ratified commitment," respondents:

—represented that their present plans committed them to helping the franchise sector of the business succeed; A224.

—represented there was no antagonism towards the franchisees and that there were no separate strategies for company and franchise stores;

—represented the System's current plans provided for "aggressive but controlled growth" and a major part of that planned growth included bringing in new franchisees;

—represented the current decisions and plans provided for financial assistance to franchisees for new unit growth when a contrary policy was already in effect;

—represented the System was financially strong and viable;

—represented Burger Chef restaurants were a "sound business opportunity" when in fact the operation of such restaurants was known to Defendants to be a "high risk venture" and that simple maintenance of the entire base business was "highly risky." E66, A224, E68, E80, E135; and

—represented Burger Chef was not for sale when, in fact, the decision to sell it had already been made.

All of these misrepresentations and false statements, made repeatedly in various forms from 1978 until 1981,

were intended to and did induce increased commitment and investment from the franchisees. B37. Respondents, in fact, expected the franchisees to rely on these representations and statements. B273.

On target, in the summer of 1981 General Foods began negotiating with Hardee's. An agreement in principle to sell the System to Hardee's was announced on December 9, 1981.

C. EFFECTS OF RESPONDENTS' STRATEGIES

Respondents' strategies had a predictable effect on the System. From 1972 to 1977, the number of Burger Chef outlets remained relatively constant, while total fast food outlets increased over 50 percent. E49; B18-20. Overall profit performance deteriorated from 1979 to 1980. A145. Losses before interest and taxes increased from $2.4 million in Fiscal 1978 to $5.3 million in Fiscal 1980. *Id.* Franchise sales declined 20 percent in Fiscal 1980 from Fiscal 1978. *Id.* The number of stores decreased 22 percent in Fiscal 1980 from Fiscal 1978, and, consistent with the directions outlined in the Finance Committee's report of September 1978, Burger Chef's financial commitments to the franchise segment declined to $11.5 million in Fiscal 1980—down 58 percent from Fiscal 1978. *Id.*

Over the six-year period from Fiscal 1970 to Fiscal 1974, there was a "continuous decline in the number of franchise new store openings." E71. Company stores in all markets were unprofitable and, in fact, "had a long way to go to return to profitability." E119. The System had a negative real growth of 1.8 percent for the period 1973 to 1981, and a 5 percent negative real growth from 1975 to 1981. A163, B243.

Over the same period of time, in ignorance of respondents' true actions concerning the System and in reliance upon respondents' misrepresentations, the Vaughns and other franchisees increased their investments

in the System. As of December 1981, the Vaughns had invested $6.3 million in their Burger Chef units for what respondents' expert described as the "not . . . inspiring rate of return" of a $370,000 net loss incurred from 1971 to 1981. B295-96, B299, B291. While respondents were tearing down the System, brick by brick, the franchisees were induced to buy brand new bricks.

D. Course of Proceedings

The case went to trial in February, 1985. The breach of contract and breach of fiduciary duty claims were dismissed at the close of plaintiffs-petitioners' case. The jury returned a verdict in favor of the Vaughns on March 6, 1985. It awarded actual damages of $4.8 million and punitive damages of $9.2 million. App. 31a. Defendants-respondents' subsequent motion for a JNOV or, in the alternative, for a new trial was denied. App. 32a. On appeal, the Seventh Circuit reversed the denial of the motion for JNOV. 797 F.2d 1403; App. 1a; 43a. The appellate court subsequently denied plaintiffs-petitioners' petition for rehearing and suggestion for rehearing en banc. 797 F.2d 1403; App. 44a.

In reversing the denial of the JNOV, the Seventh Circuit found petitioners had failed to provide sufficient proof of any of the elements of fraud under Indiana law. Contrary to the jury verdict, the appellate court found petitioners had failed to show that representations of present facts were made to the Vaughns upon which they had a right to rely. They, therefore, could not have suffered any losses attributable to defendants. In addition, the Seventh Circuit found none of the defenses to releases were applicable to this case and the releases, therefore, barred the action.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DE NOVO REVIEW AND REINTERPRETATION OF THE FACTS USURPED THE JURY'S ROLE AS FACTFINDER, VIOLATED THE SEVENTH AMENDMENT AND RAISES AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE STANDARD OF REVIEW APPELLATE COURTS SHOULD UTILIZE IN REVIEWING DENIALS OF MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A. DESPITE THE STRICTURES OF THE SEVENTH AMENDMENT, APPELLATE COURTS DO NOT UTILIZE A UNIFORM STANDARD OF REVIEW IN DIVERSITY CASES INVOLVING DENIALS OF MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

While this Court has emphasized the importance of limited appellate review of jury verdicts, it has not addressed the need for a uniform federal standard of review in diversity cases, with a more limited review by appellate courts where denials of JNOV's are at issue. This problem is squarely presented by the Seventh Circuit's decision in this case.

The Seventh Amendment provision that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States" places severe limits upon an appellate court's review of a jury verdict. This principle has long been recognized by this Court.

For example, in *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), where the factual question was what constituted a gift under the Internal Revenue Code, this Court said:

> [A]ppellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether

> it cannot be said that reasonable men could reach differing conclusions on the issue.

336 U.S. at 290-91 (citation omitted). This restriction upon appellate review stems from the fact that the Seventh Amendment allots specific functions to court and to jury:

> The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury ... and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

Baltimore & Carolina Line, Inc. v. *Redman*, 295 U.S. 654, 657 (1934).

The commonly expressed standard for grant or denial of a motion for judgment notwithstanding the verdict ("JNOV"), as with a motion for a directed verdict, is whether there is evidence upon which the jury could properly find a verdict for that party.[3] 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2524 (1971). The sufficiency of the evidence supporting a jury verdict is a question of law which the court determines. *Id.*

In reviewing the sufficiency of the evidence to support a jury verdict, this Court has cautioned on many occasions against over-reaching by appellate courts. In *Lavender* v. *Kurn*, 327 U.S. 645 (1945), for example, the petitioners had won a jury verdict in a suit in state court to establish respondents' negligence in the death of a railroad employee, Haney. Petitioners argued Haney had been struck

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[3] As is discussed below, the same standard of review has been applied at both the trial court and the appellate court levels. 9 C. Wright & A. Miller, Federal Practice and Procedure, §2524 (1971).

by a protrusion from a train. Respondents contended that Haney had been killed by an unidentified murderer. The Supreme Court of Missouri reversed the jury verdict, finding no substantial evidence of negligence to support the submission of the case to the jury. This Court reversed.

> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. . . .
>
> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

327 U.S. at 652-53 (citations omitted) (emphasis added). *Accord, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-97 (1962) (Court of Appeals must give party prevailing at trial the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn); *Basham* v. *Pennsylvania Railroad Co.*, 372 U.S. 699, 700 (1963) (*per curiam*) (conflict in testimony was resolved by jury verdict for petitioner and since an evidentiary basis existed for the verdict, it should not be set aside); *Halliday* v. *United States*, 315 U.S. 94 (1941) (circuit court erred in finding insufficient evidence to support jury verdict); *Conway* v. *O'Brien*, 312 U.S. 492 (1941) (same); *Berry* v. *United States*, 312 U.S. 450, 453 (1940) (judges do not have "any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law.")

Ironically, it has been in the context of cases under Fed. R. Civ. P. 52(a) that this Court has made its most recent statements concerning the role of the trier of fact.[4] In *Anderson* v. *City of Bessemer City, N.C.*, 105 S. Ct. 1504 (1985), this Court reversed the Fourth Circuit's reversal of a district court's finding that the petitioner had been discriminated against on the basis of sex. The Court found that the circuit court had misapplied the "clearly erroneous" standard of review.[5] In so holding, the Court said

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[4] Fed. R. Civ. P. 52(a), as amended in 1985, reads in pertinent part as follows:

> (a) EFFECT. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

[5] Rule 52(a) as applied in *Anderson*, read in pertinent part . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

that it was not the function of appellate courts to decide factual issues *de novo*. 105 S. Ct. 1511-12 *quoting Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S. 100, 123 (1969). This Court emphasized the importance of deference to the trier of fact:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977).

105 S. Ct. at 1512.

Such deference is even greater when the trier of fact is making credibility determinations.

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. . . . But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and fa-

> cially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

105 S.Ct. 1512-13 (citations omitted).

In *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982), another case under Rule 52(a), this Court also emphasized that "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact." Appellate courts are not to substitute their interpretations of evidence for those of the trial court because the reviewing court might resolve ambiguities in a different way or give the facts another construction. 456 U.S. at 857-58. *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) ("The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence."); *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952) ("There is no case more appropriate for adherence to this rule [52(a)] than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.")

If this principle of deference to the trier of fact prevails when the trier of fact is the trial judge, then it is critical when the trier of fact is a jury. As it has with review of Rule 52(a) findings, this Court should address the questions of a uniform federal standard for directed verdicts and JNOV's[6] and a particularly stringent standard eschewing

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[6] There is currently a split among the circuits concerning the appropriate standard for directed verdicts or JNOV's in a diversity case. Some circuits such as the Seventh and Sixth apply the relevant state standard while others, such as the Fifth and Tenth, apply the federal

de novo review for denials of JNOV motions.[7]

As in this case, where a trial judge, the "thirteenth juror," has found that petitioners have given many examples, in their opposition to defendants' JNOV motion, of evidence from which the jury could have reached its conclusion, Order Denying Defendants' Post-trial Motions, App. at 36a, the reviewing court should be loath to second guess both the jury and the trial court.[8] That standard of review is supported by the same policy reasons which underlay the amendment of Rule 52(a) to require restricted appellate review of a trial court's factual findings, whether based on oral or documentary evidence.[9]

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standard. Compare *Vaughn*, 797 F.2d at 1410 and *Kuziw* v. *Lake Engineering Co.*, 586 F.2d 33, 35 (7th Cir. 1978) with *Foster* v. *Ford Motor Co.*, 616 F.2d 1304, 1309 n.10 (5th Cir. 1980). 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2525 n.69 (1971).

[7] In review of motions for new trials, some courts apply a narrower standard of review where the trial court has denied the motion and a broader standard where the trial court has granted the motion. The distinction is grounded in Seventh Amendment concerns for the function of the jury. *See, e.g., Mallis* v. *Bankers Trust Co.*, 717 F.2d 683, 690 n.11 (2d Cir. 1983); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362-63 (5th Cir. 1980); *Bevevino* v. *M.S. Saydjari*, 574 F.2d 676, 686-87 (2d Cir. 1978).

[8] Petitioners are not challenging the principle that grant of a JNOV does not offend the Seventh Amendment. Where the trial court, however, has made its judgment that there was not a "run-away jury" in the case, the scope of the appellate review of both the jury verdict and the trial court's endorsement of it should be extremely circumspect. The standard for review of denials of motions for JNOV should, therefore, not be the same for the trial court and the appellate court. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 n.28 (1971).

[9]

> These considerations [favoring more searching appellate review of findings based on documentary evidence] are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal should be the finder of facts. To permit courts of appeals

B. THE SEVENTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN INTERPRETATIONS OF AND INFERENCES FROM CONFLICTING EVIDENCE FOR THOSE OF THE JURY

The Seventh Circuit found no error in the jury instructions given at trial.[10] The only error of law the Seventh Circuit found was the alleged insufficiency of the evidence to support the jury verdict. In its opinion, the Seventh Circuit found:

1. The representations made to the Vaughns were opinions, not facts.
2. The representations made to the Vaughns concerned future events rather than present facts.
3. The Vaughns and their franchisor were not in a dominate-subordinate role so as to create an obligation by the franchisor to disclose its business decisions concerning the franchise system.
4. Neither the nature of the representations nor the relationship of the parties permitted the Vaughns to rely on those representations.
5. Because there were no factual representations upon which the Vaughns had a right to rely, they could have suffered no losses attributable to defendants.
6. Releases executed by the parties bar the action.

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to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of the litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Advisory Committee's Notes to 1985 Amendment.

[10] As petitioners pointed out in their brief on appeal, Brief of Plaintiffs-Appellees at 20 n. 19, the basis of respondents' appeal was unclear, i.e., whether they were claiming error in jury instructions, error in failure to direct a verdict or insufficiency of evidence to support the verdict. With little basis in the papers, the Seventh Circuit chose to view the appeal as an appeal of the denial of the JNOV.

Despite its obeisance to a limited standard of review, albeit the state standard of review for the trial court, the Seventh Circuit's opinion is replete with reinterpretations of the evidence, evaluation of the credibility of the witnesses and choices between conflicting testimony. The key reinterpretations of evidence made by the Seventh Circuit concern the nature of the representations made to the Vaughns and the relationship between the Vaughns and defendants. Upon these issues of fact hinge the rest of their conclusions.[11] Both of these issues involve factual questions which were resolved by the jury in favor of the Vaughns. The trial court also found not only that there was no basis to grant a JNOV motion, but also that there was no basis upon which to grant respondents' alternative motion for a new trial. Since there is ample evidence in the record to support the jury verdict, the Seventh Circuit should have deferred to those in a better position to evaluate conflicting evidence.

Substantial evidence demonstrates that respondents made representations of fact, not just puffing. For example, in PX 762, Burger Chef stated that its "plans call for aggressive but controlled growth, and a big part of our plan includes bringing new franchisees into the system." Yet, very early in its management of Burger Chef, General Foods had decided to pursue an investment strategy inimical to the franchise side of the business. Under this "do-nothing" strategy, there would be no new unit growth, no investment on the franchise side of the business, and a minimal or "low investment posture" on the overall business. PX 549, 742.

Defendants and their representatives, however, continued to represent that General Foods had a present com-

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[11] Petitioners additionally contend that, since there was sufficient evidence to support findings of fraud and the existence of a confidential relationship between the parties under Indiana law, the releases cannot stand.

mitment to the franchise system. *See, e.g.*, Tr. 322 (testimony from a former Burger Chef Area Manager and Field Consultant that representations were made to the franchisees that General Foods was committed to the system); Tr. 345-48, PX 593 (commitment made to franchisees to invest in advertising, products, etc., necessary to make Burger Chef an industry leader); Tr. 438 (Burger Chef's president representing he had the backing of General Foods and they planned to do the things necessary to move the system forward); Tr. 940 (Vaughn recalled being told the company was committed to establishing Burger Chef as a strong, viable business).

There is a qualitative difference between telling the franchisees that the company is the best thing since McDonalds, and telling the franchisees that the owner is committed to the system and its continuation. *See e.g.*, Tr. 322-326. The former is "puffing"; the latter is a statement of present fact. The jury agreed with that interpretation of the oral testimony and documents, as it was entitled to do.

A substantial amount of evidence was presented at trial from which the jury could have found—and did find—the existence of a confidential relationship or a relationship in which the Vaughns reposed great trust in General Foods and Burger Chef. The jury had before it evidence regarding the length of the Vaughn's relationship with Burger Chef and General Foods—a relationship extending over a period of thirteen years. Tr. 657, 739. During those thirteen years, the Vaughns relied heavily upon General Foods and Burger Chef for information regarding the System, promotional ideas and suggestions for improvement of their restaurants. Tr. 657, 666-667, 671, 787-788, 799-804, 826-832, 969. In recognition of their franchisees' reliance upon them, General Foods and Burger Chef undertook to provide information through publication of newsletters, annual conventions, regional meetings and through representatives assigned to monitor and help franchisees in particular

areas. PX 567, 573, 593, 672; Testimony of Thomas Hughes, Tr. 222-413.

The concept of a franchise entails the grant of a "right to engage in offering, selling, or distributing goods or services under a marketing format or system which is designed by the franchisor." PX 953 at 1. Extensive involvement of the franchisor in developing, modifying and updating the marketing format or system is as critical to the success of a franchise as the efforts of the individual franchisee himself. For this reason, two-way communication between a franchisor and franchisee is essential for development of a franchise. Tr. 1034, 1054-1056 (Testimony of Dr. Robert Leone). General Foods and Burger Chef were well aware of the role of, and need for, full disclosure in franchising and purported to make provisions for it. PX 964 at BV18843 ("announce [strategy] to field and franchisees"). PX 567 ("we/they" (i.e. dichotomy between franchisees and franchisor) is a thing of the past); Tr. 1306 (Testimony of Richard Laster, then Executive Vice President of General Foods—effective communication of concept necessary to success of fast-food system).

All of these facts were presented to the jury who quite properly and reasonably concluded under the circumstances of this case, that a confidential relationship existed between the Vaughns, on one hand, and Burger Chef and General Foods on the other hand.

The Seventh Circuit was not justified in its resolution of the facts in a different manner. Its task was to determine whether sufficient evidence existed to support the jury verdict, with particular deference to the determinations of the jury and trial court. The appellate court's reinterpretation of oral and documentary evidence can be seen throughout the opinion. And that misprision of an appellate court's proper role on a denial of a JNOV motion is a mistake of constitutional dimensions.

II. THE SEVENTH CIRCUIT ERRED WHEN IT CONCLUDED, AS A MATTER OF LAW, THAT NO REPRESENTATIONS OF PRESENT FACT WERE MADE NOR DID A CONFIDENTIAL RELATIONSHIP EXIST UNDER ITS INTERPRETATIONS OF INDIANA LAW.

In the course of its reevaluation of the evidence, the Seventh Circuit also misapplied and misinterpreted Indiana law. For example, in finding that the statements made to the Vaughns were opinions about future events, the court said:

> We have reviewed the record carefully. On the basis of that review, we can only conclude that the statements made by General Foods to its franchisees and to prospective franchisees were statements of opinion. In a sales or marketing context, and franchisor-franchisee negotiations certainly are to be placed in that context, such expressions of opinion are known as 'puffing,' 'trade talk,' or 'sales talk' and do not constitute actionable fraud. *See Wisconics Engineering, Inc.* v. *Fisher*, 466 N.E.2d 745, 756 (Ind. App. 1984); *Kluge* v. *Ries*, 117 N.E. 262 (Ind. App. 1917); *Vorhees* v. *Cragen*, 112 N.E. 836 (Ind. App. 1916).

797 F.2d at 1411. App. 17a.

In *Kluge* v. *Ries*, 117 N.E. 262 (Ind. App. 1917), however, the Indiana court makes clear that representations as to value may be affirmations of fact, not expressions of opinion, as the jury found in this case. The Indiana court stated as general propositions of law:

> (2) A contracting party may rely on the express statement of an existing fact or facts, where he does not know such statements to be untrue, and where they are not obviously false. Such fact or facts may or may not be known to the party making the statement, but if he assumes to know them and asserts them as the

> basis for an agreement between himself and the other contracting party, he will be bound thereby.
> (3) Representations of value may, under certain circumstances, amount to affirmation of facts, and afford the basis of an action for damages for fraud and deceit.
> (4) Whether such representations as to value are merely the expressions of opinions or affirmations of facts to be relied upon by a contracting party is a question of fact to be determined by the jury from all the evidence in the case, and cannot be determined as a matter of law, unless the evidence authorizes but a single inference.

117 N.E. at 263. The Indiana court affirmed a jury verdict finding fraud where representations concerning the condition of a business were made.

The Seventh Circuit also relied on *Whiteco Properties, Inc.* v. *Thielbar*, 467 N.E.2d 433, 437 (Ind. App. 1984) as accurately delineating the difference between a fact and an opinion. The Indiana court stated in *Whiteco*, 467 N.E.2d at 437:

> When a seller describes goods as 'best buy,' 'finest quality,' 'good as new,' etc., he makes a subjective statement of opinion, on which no reasonable purchaser should justifiably rely. However, when the salesperson unqualifiedly guarantees his product to be free from defect, he is making an objective statement of fact. The promise of an unobstructed view of the lake is clearly an objective statement of fact, not subject to qualification.

In *Whiteco*, the plaintiffs had paid a premium for condominium units with an unobstructed view of a lake. The developers, however, subsequently built a cabana unit 11 feet tall between the plaintiffs' unit and the lake. The structure substantially impaired plaintiffs' view of the lake. The ap-

pellate court found that the evidence sustained a finding of fraud. The Indiana court said:

> The record indicates that Whiteco's project manager knew where the pool cabana would be located long before the purchasers contracted and closed their transactions. Whiteco's plan to build this structure was a fact in existence at the time the parties were promised an unobstructed view of the lake. . . . The evidence sufficiently establishes that Whiteco misrepresented a past or present fact.

467 N.E.2d at 436.

The Seventh Circuit also concluded that defendants did not make affirmative factual misstatements of their *current* policy and, thus, under Indiana law, there could be no fraud. Indiana law is, indeed, clear that "actionable fraud cannot be predicated upon a promise to do a thing in the future, although there may be no intention of fulfilling the promise." *Sachs* v. *Blewett*, 106 Ind. 151, 185 N.E. 856 (1933). However, in *Royal Business Machines* v. *Lorraine Corp.*, 633 F.2d 34, 45 (7th Cir. 1980), a case relied upon by the panel as embodying this principle of Indiana law, the Court found the following representations "readily qualify as material factual representations" upon which a fraud action could be based:

> (3) that replacement parts were readily available;
> (4) that the cost of maintenance for each RBC machine and cost of supplies was and would remain low, no more than $\frac{1}{2}$ cent per copy;
> (5) that the RBC machines had been extensively tested and were ready to be marketed;
>
> * * *
>
> (7) that the machines were safe and could not cause fires; and,

(8) that service calls were and would be required for the RBC Model II machine on the average of every 7,000 to 9,000 copies, including preventive maintenance calls.

633 F.2d at 41. The Indiana Court of Appeals has also affirmed a finding of fraud based upon statements that a bank would work with a customer for six more months. *First National Bank of New Castle* v. *Acra*, 462 N.E.2d 1345 (Ind. App. 1984). The court explicitly rejected the contention that such statements were of future intent. 462 N.E.2d at 1348.

There is in this case, as the jury and trial judge found, ample evidence in the record to demonstrate that General Foods had made business decisions which guided its day-to-day actions and which directly contradicted the representations which it was making to the Vaughns and other franchisees in order to induce them to buy franchises and continue to invest in those already purchased. Under the correct interpretation of Indiana law, those representations were of present fact.

As noted earlier, another linchpin of the Seventh Circuit's opinion was its conclusion that the relationship among the parties did not create an obligation on the part of the franchisor to disclose its business decisions concerning the franchise system. The Vaughns, according to the Seventh Circuit, did not have any right to rely upon the representations.

Under Indiana law, a duty to disclose material information is imposed when the following circumstances exist: 1) where the parties do not deal at arm's length or occupy substantially the same relative position in the transaction; and 2) when a party to a transaction undertakes to partially disclose facts within his knowledge. *McCowen, Probst, Menaugh Co. v. Short*, 69 Ind. App. 466, 474 (1918); *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428, 431 (Ind.App. 1984). Due to the factual nature of situations in

which a duty to disclose may arise, the existence or non-existence of such a duty is one for the jury's determination. *Scott v. Brown*, 90 Ind. App. 367, 378, 157 N.E. 64 (1929). Here, there is agreement that the jury was properly instructed as to the applicable law and, based on all the evidence, the jury could properly have concluded that a duty to disclose existed.

The absence of a blood, marital or fiduciary relationship between the parties is of no consequence. As noted in *Scott v. Brown*, 90 Ind. App. at 378 (1929):

> The term "confidential relation" is a very broad one and is not at all confined to any specific association of the parties, but applies generally to all persons who are associated by any relation of trust and confidence. It arises when a continuous trust is reposed by one person in the skill or integrity of another. 12 C.J. 421.

As a result, Indiana law has developed so that:

> Where parties do not deal at arm's length, *or* occupy substantially the same relative position in the transaction, and one of them is justified in, or excusable for, reposing confidence in the other, under the circumstances, the duty rests upon the party occupying the superior position to act in the utmost good faith, to give to the other party all material information possessed by him, to withhold no information and to take no undue advantage of his position, or of the dependence or weakened condition of the other party.

McCowen, Probst, Menaugh Co. v. Short, 69 Ind. App. 466, 474 (1919) (emphasis supplied).

The jury could have concluded—and did conclude—from the testimony of witnesses and documents presented during trial that the Vaughns were properly relying upon the skill and integrity of Burger Chef and General Foods. Given

these principles of Indiana law, the jury could have found—and did find—that respondents had a duty to disclose the near absence or drastic alteration of their present marketing and business decisions for the system, particularly since only Burger Chef and General Foods knew the true state of affairs.

The jury could have found—and did find—that a duty to disclose existed as a result of the fact that General Foods and Burger Chef engaged in partial disclosures which were misleading. Under these circumstances, a finding of such a duty is justified under Indiana law.

> [I]f a seller undertakes to disclose facts within his knowledge, he must disclose the whole truth without concealing material facts and without doing anything to prevent the other party from making a thorough inspection. For, if in addition to this silence, there is any behavior of the seller which points affirmatively to a suppression of the truth or to a withdrawal or distraction of the other parties' attention to the facts, the concealment becomes fraudulent.

Indiana Bank & Trust Co. v. Perry, 467 N.E.2d 428, 431 (Ind. App. 1984). The record is replete with disclosures by Burger Chef and General Foods that were not only partial, but were false representations regarding the true state of Burger Chef's and General Foods' franchising actions and decisions.[12]

This Court should grant certiorari to correct the appellate court's misinterpretation of important issues of Indiana law.

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[12] Under Indiana law, both the jury and trial court found the misrepresentations made were of present facts and that a confidential relationship existed. Any one of three grounds—fraud, lack of adequate consideration and duress—is supported by sufficient evidence and voids the releases signed by the Vaughns at respondents' inducements.

CONCLUSION

Petitioners respectfully request this Court issue a writ of certiorari to the Seventh Circuit to consider these important issues.

Dated: December 4, 1986.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The
United States Court of Appeals
For the Seventh Circuit

No. 85-1847

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION and SPRINGFIELD DRIVE-INS, INC.,
Plaintiffs-Appellees,

v.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. H 82-621—Michael S. Kanne, *Judge.*

Argued January 7, 1986—Decided July 29, 1986

Before Wood, Jr., Easterbrook and Ripple, *Circuit Judges.*

Ripple, *Circuit Judge.* In 1982, plaintiffs Al Vaughn, Marjorie Vaughn, Algon Corporation, and Springfield Drive-Ins., Inc. (Vaughns) instituted this diversity action against General Foods Corporation and Burger Chef Systems, Inc. (the Company) claiming that they had been fraudulently induced to invest in Burger Chef franchises. The Vaughns claimed that Burger Chef engaged in a ten-year plan to dispose of its business (the System) while representing to its franchisees that it planned to build the System into a "fast food contender." Following a jury trial

on a claim of fraudulent misrepresentation,[1] a verdict was entered for the plaintiffs. The defendants filed a motion for a judgment notwithstanding the verdict (JNOV) pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. The district judge denied the motion. For the reasons detailed below, we reverse the judgment of the district court.

I

The Vaughns' relationship with Burger Chef began in 1963 when they opened their first Burger Chef fast food restaurant in the St. Louis, Missouri area. By 1967, the Vaughns owned and operated five Burger Chef restaurants and, in 1970, they acquired a sixth. In 1968, General Foods entered the hamburger fast food market by acquiring the Burger Chef chain as a wholly-owned subsidiary for $16 million and the assumption of substantial pre-existing liabilities. The business did not, however, proceed according to General Foods' expectations. Accordingly, in 1971, General Foods, as a result of significant losses, wrote down $80 million of its investment in Burger Chef. This write down was widely publicized and was well known to Burger Chef's franchisees. As a result of the write down, some 460 franchised and company-owned stores were closed, and General Foods considered selling its Burger Chef operation which consisted of the 908 remaining restaurants. However, no buyer could be found. Therefore, instead of selling the Burger Chef operation at that time, General Foods decided to "manage the loss" and shifted its focus to developing its "heartland" market in the Midwest. As part of its new strategy, General Foods discontinued its former

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[1]The jury was instructed on two different theories of fraud presented in Count III of the Vaughns' amended complaint. R. 101. The first was based on Indiana common law, and the second was based on section 706 of the Illinois Franchise Disclosure Act, Ill. Ann. Stat. ch. 121-1/2, ¶ 706 (Smith-Hurd 1960 & Supp. 1985). *See infra* note 5 for discussion of the statutory claim.

practice of guaranteeing leases for franchisees and diminished the amounts of capital it infused into the System. The new strategy did not, however, yield the return that the Company had anticipated. Continuing financial difficulties caused the Company to begin voluntarily to waive and abate franchise fees.

In December 1975, General Foods commissioned the consulting firm of Booz-Allen & Hamilton to analyze the Company's marketing strategy. As a result of that firm's recommendations, another new plan was developed. Among the facets of that strategy were recruitment of new management experienced in the hamburger fast food industry and minimization of the risks of the franchise operation. In order to implement this new approach, General Foods hired Terrance Collins, an expert in the hamburger fast food industry, from McDonald's to serve as president and chief operating officer of Burger Chef. In August 1978, the Company's financial department devised a study on the salability of the Burger Chef System. This study, codenamed "Project Beethoven," indicated that Burger Chef was now ranked fourth in the hamburger fast food market and that it still held second place in its "heartland" markets.

In late 1980, General Foods contracted with Goldman Sachs, an investment banking firm, to review its options with respect to Burger Chef. Goldman Sachs advised General Foods that the value of the System was unlikely to deteriorate and that they should reconsider selling the System after 1981. Goldman Sachs' reasoning was that, if the new strategy worked and the business turned around, its profitability would make it more salable. This reasoning would appear to have been sound. In 1981, Burger Chef finally showed a profit and, in summer 1981, General Foods received an unsolicited inquiry concerning the purchase of the System. Several months of negotiations resulted in the December 1981 agreement to sell Burger Chef to Hardee's, a competing chain. By the time that the System was sold

to Hardee's for $43.5 million, General Foods had infused between $45 and $70 million in capital into the System in addition to the purchase price.

Shortly after the sale was consummated, the Vaughns instituted suit in the district court alleging that the defendants had violated the antitrust laws, had breached their fiduciary duties to the Vaughns, and had fraudulently misrepresented their intentions with respect to the Burger Chef System. On June 30, 1983, the Vaughns filed a first amended complaint, which contained claims only for breach of contract, breach of fiduciary duty, fraud and punitive damages. The breach of contract and breach of fiduciary duty claims were dismissed at the close of the plaintiffs' case.

At trial, the Vaughns attempted to prove that various statements made by General Foods and certain omissions, coupled with assertions contained in brochures and trade publications, created a false impression in the minds of the Vaughns and other franchisees that the System was viable and that it was supported fully by General Foods. According to the Vaughns, these statements and omissions constitute actionable fraud. Specifically, the Vaughns point to statements made in certain written documents. At trial, Mr. Vaughn testified that, in or around 1970, he became aware of these undated publications which reflected the Company's intent to expand its franchise operation. Tr. 827. One such document, an undated brochure designed to woo prospective franchisees to open a Burger Chef restaurant, stated:

> **WHY BURGER CHEF?**
>
> A Burger Chef Restaurant franchise gives you the opportunity to be an independent business person while still being a part of a proven system. As a franchisee, you'll enjoy the full support and backing of one of the largest hamburger fast-food chains in the nation. Our plans call for aggressive but controlled

growth, and a big part of our plan includes bringing new franchisees into the system.

* * *

As a wholly owned subsidiary of General Foods Corporation, Burger Chef Systems, Inc. has the financial stability which this multi-billion dollar, international food corporation brings to it.

Yet Burger Chef remains an independent, autonomous corporate entity which is managed and directed by seasoned executives with many years of experience in the fast-food industry.

Plaintiffs' Ex. 762 at 5. The brochure also stated that the franchisor would provide the franchisee with a wide variety of support services:

..GETTING YOU STARTED

Once your franchise application is approved, Burger Chef Systems will implement a systemized program to help you get your restaurant open and operating with the greatest possible ease. We'll provide you with the kind of support you need, when you need it—and you'll be assisted by experienced personnel during each phase of the development process . . . and beyond.

* * *

Marketing

You can be sure of customers from the moment your restaurant opens for business because long before this important event you'll begin receiving the advantages of Burger Chef's marketing support services.

Outstanding televis on and radio commercials, newspaper ads, point-of-sale materials and more are available for your own use and combine to spread the word about Burger Chef—and the quality it represents.

Burger Chef's Regional Field Marketing Representative will work with you and provide the help you need to turn your restaurant opening, grand opening and other future events into important community occasions. Burger Chef will make available numerous marketing and public relations tools to help you launch your business venture.

Utilizing the best of creative talent in the areas of advertising and promotion you'll receive the benefit of Burger Chef's fully coordinated advertising and promotion campaigns.

* * *

CONTINUING SUPPORT

After your restaurant is open, you'll continue to receive professional assistance and support from Burger Chef's regional operations and functional support departments.

A Burger Chef Field Consultant in your area is responsible for helping you achieve success. You can depend on this person who has already proven to be a successful restaurant manager. Your Field Consultant's years of experience assure you that no details in the operation will be overlooked. The Field Consultant is your personal link with Burger Chef Systems, who will provide you with information and direct you to company resources which will help you maximize sales and profits and operating ability. Periodic visits to your restaurant in response to your personal requests for help and annual comprehensive on-site reviews of your operation will provide you with the professional guidance and information you need to realize your restaurant's operational potential. But perhaps most important, your field consultant will be there anytime you need help.

Id. at 8, 10, 11.

Another such document, entitled "Burger Chef, Independence with Security," also was designed to encourage potential franchisees to join the Burger Chef System. Plaintiffs' Ex. 730. That brochure noted that the purchase of the Burger Chef System by General Foods gave the System:

> access to the resources of a corporation that extends into almost every field of consumer food products. With General Foods, Burger Chef has continued its growth, providing fast, low-cost, quality food to new markets coast to coast and eventually overseas.
>
> The future growth of Burger Chef depends upon finding qualified ambitious men, like yourself, who are sales and management oriented. The Burger Chef System is within the reach of the small investor providing him with the opportunity to be independent while offering the advantages of a large corporation. And with Burger Chef you are not starting a new or unknown business; opening a Burger Chef franchise is starting another outlet of a successfully established enterprise complete with the knowledge, research, and backing of the corporation and franchisees who have already made Burger Chef successful.
>
> * * *
>
> Each Burger Chef franchisee is an independent businessman who is also a member of the Burger Chef team—a team composed of all the independent franchisees and company store managers with the support of Burger Chef. Each member of the team, whether franchisee, company store manager or at the corporate level, contributes his efforts, ideas, and work to make the Burger Chef system the successful combination of independent businesses with the advantages of a large corporation.

Id. at 2-3, 10. The booklet indicated that the franchisee would provide the monetary investment, enthusiasm, hard work and cooperation. In return, General Foods would provide a proven system, the financial advantages of a large corporation, marketing assistance and continuing help and advice.

Still another such undated document, also designed to solicit franchisees, stated:

BURGER CHEF BACKS YOU UP

What will Burger Chef do to help you in your business? We won't run your business for you . . . and you wouldn't want us to. We offer comprehensive suggestions in the key areas of:

Real Estate and Construction
—site selection
—site planning
—building specifications/drawings
—construction

Training
—restaurant management training
—manager training aids
—hourly employee training aids

Research and Development
—new products
—equipment

Purchasing and Distribution
—supply sources
—specifications
—quality assurance

Field Service
—Area Manager support
—Headquarters support services

Marketing

—promotions
—advertising materials
—test marketing of new products and promotions

Plaintiffs' Ex. 736 at 8. According to Mr. Vaughn, these various brochures, designed to attract new franchisees, were also relevant to him. He asserts that the brochures:

> told me what Burger Chef was doing. They were actively seeking franchises. They had the brochures; they were probably mailing them out or giving them to prospective investors.
>
> It also told me and solidified the fact that it was a viable, operationg [sic] system. It told what it would do for the franchisees if they became franchisees. It gave them all the aspects of how to get into business; told them about training, training their—training them to operate a Burger Chef, the marketing and research and development behind the system.
>
> We—we just—it just solidified everything that we had been doing. We were positive we were going places. I mean that's why I wanted—that's why I was interested in them. That's why I picked them up. That's why I asked for them, if I saw one that I hadn't seen, it was an update.
>
> • • •
>
> They were telling us that the system was going forward and this—this solidified that they were actively seeking franchisees. They had the brochures out.

Tr. 830-31, 832.

The Vaughns allege that other misrepresentations were contained in a November 1976 publication entitled "Licen-Scene," the Burger Chef monthly magazine. One article entitled, " 'We/they' is thing of past," written by Phil Korn, stated:

> I hope you sensed in all those slides and speeches that a much closer relationship has developed between the company and the franchise community. The "we/they" relationship is a thing of the past: it has to be, because the ultimate success of one party depends to an increasing degree on the success of the other.

Plaintiffs' Ex. 567 at 2. Mr. Vaughn later testified that this publication changed his belief that there was a division between the company and the franchisees:

> A There was a time when we very definitely felt that a division between company and franchise stores. This says we're both going to be together, instead of—well, we're going to pull together as a team now.
>
> Maybe, maybe it was a feeling that I had, I don't know, but I'm sure that—well, I don't know.
>
> Q When you read it did you believe that?
>
> A I certainly did. I hoped and prayed that that would happen.

Tr. 788.

The March/April 1978 edition of the successor publication to Burger Chef's LicenScene, "Chef's Front Page," discussed a new marketing strategy created by General Foods, called "Whatever it Takes." Plaintiffs' Ex. 593. This strategy was implemented at an April 1978 meeting in Innisbrook, Florida, which Mr. Vaughn did not attend. The motto was devised by Terry Collins, the new president of the Burger Chef System, who had been hired from McDonald's. An article, describing the strategy, stated:

> The imagery of "Whatever it takes" focuses on Burger Chef's future. To sum up the 1978 Burger Chef franchise convention in a sentence, "Whatever it takes" in the way of restaurant facilities and equipment, whatever it takes in terms of signage and mar-

> ket identity—in terms of advertising, and promotions, and products, and packaging, and customer service, and System growth—that's what we're going to do in order to usher Burger Chef into the 1980s as an industry leader.
>
> That's a long sentence, but you can take it to mean there's a lot to do. As the theme of the January convention, "Whatever it takes" was more than a promise: it was a ratification of commitment and a call to action.
>
> "We're determined at Burger Chef to build the finest franchise organization in the country," said Roger Schafer, vice president of franchise operations, in his headliner address. "We ask nothing less than total commitment from you, and we pledge you nothing less than total commitment from us."

Plaintiffs' Ex. 593 at 2.

The Vaughns also offered testimonial evidence of the alleged misrepresentations to supplement the documentary evidence. Mr. Vaughn testified that many statements made to him by Burger Chef and General Foods' executives lulled him into believing that the System was viable and that General Foods was committed to its franchise operation. The first such statement Mr. Vaughn claims to have relied on was a telegram sent to him, in 1968, by Burger Chef's executives, explaining that the System had been purchased by General Foods. Mr. Vaughn testified with respect to a telegram that he received in 1968 informing him that General Foods had acquired the Burger Chef System:

> Q When did you first become aware that General Foods had acquired Burger Chef?
>
> A We received a telegram from Frank Thomas, Don Thomas and Bob Wildman; Bob Wildman was a vice-president and Don Thomas was a vice-president, Frank

Thomas was president, stating that General Foods had bought Burger Chef Systems.

And also in that telegram they stated how much support and help they would get from General Foods and the system would continue to grow and we would be a viable business, viable fast-food-hamburger system in the country, the most viable thing. I don't recall the exact way it said it.

* * *

Q You relied on that telegram?

A I certainly did.

* * *

Q Based upon the statements that you heard and the comments made to you in that telegram and the purchasing of the company, what if anything was your understanding with respect to the purchase of Burger Chef by General Foods?

A I understand exactly what the telegram said and what every—all the other communications that we had from Burger Chef System said, that we would continue to grow. It would be a viable business system. Burger Chef would be a business with—they even talked about overtaking McDonald's. I believed everything that it said. I had to believe everything. I was—boy, we're really going, I mean what more could I think than that?

Tr. 657, 658, 660-61. Mr. Vaughn also described statements made at Burger Chef's annual convention in Las Vegas in 1969 regarding the potential of the Burger Chef chain:

Q At that convention did anyone from Burger Chef or General Foods ever make any representations to you that you heard or to the others in attendance at

that time about growth or improving your position in the market?

A That was Matt Shannon's primary part of his speech about that, yes, we were going to grow; we were going to get bigger; we were going to be better; we had General Foods behind us. . . .

Q Do you recall seeing a slide presentation at that convention?

A Yes.

Q Could you describe that for us?

A Well, I think the Burger Chef was going to push the clown off the cliff or something like that, or overtake it. I mean it was—I can recall—yes, it was something like that. There were quite a few things like that.

Q What did that signify?

A That meant we were going to overtake Mcdonald's.

Q Did Mr. Arnett [president of Burger Chef Systems] speak to the convention or address you?

A Yes.

Q What if anything did he say?

A Everything was always along the same line, that now that General Foods is with us we're going to be stronger, we're going to have the financial support of General Foods; we're going to have all the advertising techniques of General Foods; we're going to have all the research and development behind us that General Foods has and can give to us. They're the largest food purveyors in the country and we've got them behind us and they're going to help us.

Tr. 661-63. Another interpretation of the significance of the Las Vegas meeting was presented by Thomas Hughes,

a former Burger Chef Area Supervisor. Mr. Hughes stated, "I'll never forget this as long as I live. There was a slide with the McDonald's clown standing up and the Burger Chef logo pushing him over backwards. In other words, we were going to beat him, the impression he gave me." Tr. 244.

In addition to the statements which the Vaughns claim constitute actionable misrepresentations, they also allege that certain nondisclosures of purportedly material facts constitute actionable misrepresentations. These include: the study known as "Project Beethoven," Plaintiffs' Ex. 164; the recommendations made by Goldman Sachs with respect to the feasibility of selling the System, Plaintiffs' Ex. 66; and the results of the study conducted by Solomon Brothers in 1980 to assess the possibility of selling the System, Plaintiffs' Ex. 791.

The case was tried to a jury. On March 6, 1985, the jury returned a verdict in favor of the Vaughns and awarded actual damages in the amount of $4,800,000 and punitive damages in the amount of $9,200,000. On March 18, 1985, the defendants entered a motion for JNOV or, in the alternative, for a new trial. This motion was denied, and a timely notice of appeal was filed.

II

The issues before us on this appeal are whether, as a matter of law, the Vaughns stated an actionable claim for fraud; whether punitive damages were available and whether the releases from liability signed by the Vaughns constitute a bar to their claims for fraud. However, before we discuss the substantive issues before us, we note that this case is before us as an appeal from the denial of a motion for a JNOV. Therefore, the following standards govern our consideration of the substantive issues. Jurisdiction in this case is based upon diversity of citizenship. In a diversity action, to determine whether the district

judge properly denied the motion for a JNOV, we must look to the appropriate state standard. It is undisputed that this case arises under Indiana law. The Indiana equivalent of a JNOV is a judgment on the evidence pursuant to Ind. Tr. R. 50. According to Rule 50, the motion for a post-verdict judgment on the evidence must be granted where the verdict is not supported by sufficient evidence. In deciding the motion, the trial court must "view only the evidence favorable to the non-moving party and the reasonable inference to be drawn from that evidence." *Huff v. Travelers Indemnity Co.*, 266 Ind. 414, 363 N.E.2d 985, 990 (1977). Accordingly, the "trial court may enter judgment only *if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim,* i.e., the evidence must point unerringly to a conclusion not reached by the jury." *Id.* (citation omitted and emphasis in original).

III

FRAUD

The appellants' arguments on appeal focus on the propriety of the district court's allowing the Vaughns' fraud claims to go to the jury. Under Indiana law, the essential elements of fraud are a "material representation of past or existing facts, which representations are false, made with knowledge or reckless ignorance of this falsity, which cause a reliance upon these representations to the detriment of the person so relying." *Whiteco Properties, Inc. v. Thielbar,* 467 N.E.2d 433, 436 (Ind. App. 1984) (quoting *Blaising v. Mills,* 176 Ind. App. 141, 374 N.E.2d 1166, 1169 (1978)). In order to determine the propriety of allowing the fraud claim to go to the jury, we must consider whether the Vaughns established a *prima facie* case of fraud. Accordingly, we shall consider each element of the fraud claim separately.

A. *Material Misrepresentation*

The first element of fraud is that the defendant must have made a material misrepresentation of a past or existing fact. *Fleetwood Corp. v. Mirich,* 404 N.E.2d 38, 42 (Ind. App. 1980). The false statement must be made knowingly or with reckless disregard for its falsity. Both omissions and misrepresentations are actionable under Indiana law. According to the appellants, the Vaughns' claim fails to meet this first prong in two respects: (1) the statements upon which the Vaughns purportedly relied were not "facts," and the statements made by General Foods all related to future rather than past or existing events, *see Royal Business Machines v. Lorraine Corp.,* 633 F.2d 34, 45 (7th Cir. 1980); and (2) General Foods had no duty to disclose all available facts to the Vaughns.

1. Fact v. Opinion

First, the appellants argue that any representations made to the Vaughns were opinions and, in any event, were statements of future rather than past or existing facts. It is well-settled that "[a] statement which is merely an expression of opinion or which relates to future or contingent events, expectations or probabilities, rather than to pre-existent or present facts, ordinarily does not constitute an actionable misrepresentation." *Metropolitan Bank & Trust Co. v. Oliver,* 4 Ill. App. 3d 975, 987, 283 N.E.2d 62, 64 (1972); *see Peterson Industries, Inc. v. Lake View Trust and Savings Bank,* 584 F.2d 166 (7th Cir. 1978). Expressions of opinion are not actionable, and the court should refuse to submit such statements to the jury. *Plymale v. Upright,* 419 N.E.2d 756, 760-61 (Ind. App. 1981) (citing 37 C.J.S. *Fraud* §§ 55, 124); *see Montgomery Ward & Co. v. Tackett,* 163 Ind. App. 211, 323 N.E.2d 242, 248 (1975).

The Vaughns counter that the distinction between fact and opinion has been considered a "logical absurdity." *See Whiteco Properties,* 467 N.E.2d at 437 (citing Calamari &

Perillo, *Contracts* § 9-17 (2d ed. 1977)). However, the distinction is both recognized and applied by the courts. *See Royal Business Machines,* 633 F.2d 34. The distinction between a fact and an opinion was accurately delineated by the *Whiteco Properties* court. The court noted that the distinction, "serves to deny relief to persons who unjustifiably rely on a seller's 'puff' or 'trade talk.' " 467 N.E.2d at 437 (citing Calamari & Perillo, *Contracts, supra,* § 9-17). An opinion is a subjective statement of belief "on which no reasonable [person] should justifiably rely." *Whiteco Properties,* 467 N.E.2d at 437. On the other hand, an unqualified guarantee is "an objective statement of fact" upon which reliance may be justified. A statement may be characterized as one of fact if the content of the statement is susceptible of "exact knowledge" at the time the statement is made. *Smart & Perry Ford Sales, Inc. v. Weaver,* 149 Ind. App. 693, 274 N.E.2d 718, 721 (1971).

We have reviewed the record carefully. On the basis of that review, we can only conclude that the statements made by General Foods to its franchisees and to prospective franchisees were statements of opinion. In a sales or marketing context, and franchisor-franchisee negotiations certainly are to be placed in that context, such expressions of opinion are known as "puffing," "trade talk," or "sales talk" and do not constitute actionable fraud. *See Wisconics Engineering, Inc. v. Fisher,* 466 N.E.2d 745, 756 (Ind. App. 1984); *Kluge v. Ries,* 117 N.E. 262 (Ind. App. 1917); *Vorhees v. Cragen,* 112 N.E. 826 (Ind. App. 1916). We believe that General Foods' statements regarding the "viability' of the System could only be characterized as "puffing."[2] They were not a guarantee of a particular degree of success. Indeed, success is itself a subjective term. General Foods' statements regarding the potential of the com-

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[2]Viability has been defined as "capable of working, functioning, or developing adequately" or "having a reasonable chance of success." Webster's Ninth Collegiate Dictionary 1313 (1985).

pany were designed to encourage investment by new franchisees and to stimulate the existing franchisees' enthusiasm. On the evidence presented here, the jury could not have found that, at any given moment during the period in question, General Foods or Burger Chef had a firm, present intention to make the System anything other than "viable." While the evidence does show that management, at various times, thought that viability could best—or only—be achieved through a readjustment of the franchisor-franchisee relationship and by eliminating franchisees who were unwilling to adjust or were inefficient, such management strategy is hardly actionable as fraud.[3]

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[3]According to Thomas Hughes, a former Burger Chef Area Manager and Field Consultant, new strategies to improve the business were openly discussed at meetings between management and the franchisees. As the following excerpt reveals, these strategies were not necessarily popular with or beneficial to every franchisee:

> Q [C]an you tell us what conclusions were discussed with regard to the impact on the competitiveness of the Burger Chef System 1968 to 1980 based on the lack or the decline and growth of the system compared to the rapid increase in growth of Burger Chef's major hamburger fast-food competitors?
>
> * * *
>
> A Well, the impact is obvious. We either have to grow or we were in trouble. You either had to start building new restaurants or there were going to be some franchisees that didn't make it.
>
> I can remember Terry Collins [President of Burger Chef] was asked a question by Dave Poulin, who was a franchisee in Denver. He said, we're developing the heartland first, and Dave Poulin stood up and said, "I'm from Denver and—"
>
> * * *
>
> The Witness: Mr. Poulin had five or six stores in the Denver market, which was not designated as a development market, and he was about at the break-even point in those restaurants.
>
> And so he asked Mr. Collins what he was going to do until Burger Chef got around to developing his area of the country,

That General Foods' idea of viability did not match the Vaughns' expectations is unfortunate—but it is not fraud. In Indiana, a statement of opinion is actionable as fraud only in limited circumstances which have been described as follows:

> Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to the value, and such representation is not a mere expression of opinion, but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound.

Boltz v. O'Connor, 90 N.E. 496, 497 (Ind. App. 1910) (quoting *Murray v. Tolman,* 44 N.E. 748 (Ill. 1896)). That is not the situation here. The Vaughns were fully aware of the value of their properties (at least, by virtue of annual tax filings), and they willingly renewed their franchise agreements with Burger Chef despite any feelings of dissatisfaction they may have harbored. The record makes clear that the Vaughns were fully aware of the intense competition they faced in the fast food arena from such chains as Burger King, Wendy's and McDonald's. Tr. 672, 794-96. The record establishes that the Vaughns had an adequate opportunity not only to assess the Burger Chef System's viability but also to evaluate their own enterprise's viability. Their decision to remain with the Burger Chef System was based on the exercise of their own business judgment. They did not rely blindly on the appellants' opinions regarding the System's future. In the final analysis, the Vaughns believed what they wanted to believe—that the System would work, that they would prosper, that General Foods would make it so. However, General Foods

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and Mr. Collins said, "I just hope you're still around." Tr. 266-67.

was not offering a panacea; rather, it was simply offering its opinion as to how the System would perform.

2. Present v. Future

Even assuming we could accept the Vaughns' position that the statements made by General Foods could be characterized as facts rather than opinions, we face another impediment to finding such statements actionable. Appellants also contend that they made no statement regarding "existing" facts; rather, they made statements regarding future events. It has long been the law in Indiana that an action for fraud cannot be based "upon promises to be performed in the future." *Smith v. Parker,* 45 N.E.2d 770, 771 (Ind. 1897); *see also Whiteco Properties,* 467 N.E. 2d at 436; *Tutwiler v. Snodgrass,* 428 N.E.2d 1291, 1296 (Ind. App. 1981); Plymale, 419 N.E.2d at 760; *Middlekamp v. Hanewich,* 147 Ind. App. 561, 263 N.E.2d 189, 192 (1970); *Sachs v. Blewett,* 106 Ind. 151, 185 N.E. 856 (1933). In fact, the Supreme Court of Indiana has expressly stated that "actionable fraud cannot be predicated upon a promise to do a thing in the future, although there may be *no intention of fulfilling the promise.*" *Sachs,* 185 N.E. at 858 (emphasis supplied). This principle has been applied uniformly by this court in fraud cases arising under Indiana law. *See, e.g., Canada Dry Corp. v. Nehi Beverage Co.,* 723 F.2d 512, 525 n.10 (7th Cir. 1983); *Royal Business Machines,* 633 F.2d at 45; *Grande v. General Motors Corp.,* 444 F.2d 1022, 1025 (7th Cir. 1971); *see also Fowler Hilliard,* 585 F. Supp. 1320, 1323 (S.D. Ind. 1984). As we have already noted, even respecting the jury's privilege to make an assessment as to credibility, the record will not support a finding that the appellants made affirmative factual misstatements of their current policy. Moreover, to a very great degree, the appellants' statements with respect to their "commitment" to growth and viability must be characterized as necessarily relating to the future. General Foods' and Burger Chef's statements to the franchisees were clearly intended to bolster mo-

rale—to allay any sense that the franchisees were on their own. The Company repeated again and again that it was committed to making *the System* viable—not that it would turn around the business of *any franchisee* but that *the System* would prosper.

Our review of the record convinces us that the real gravamen of the Vaughns' case is not that they were affirmatively misled by the appellants' misstatement of material facts. Rather, they are unhappy with the degree of success which they achieved. However, the law of fraud is not meant to protect a franchisee against a franchisor's allegedly mediocre performance. Had the Vaughns been able to show that General Foods had made certain promises to them with respect to the future of their franchises, perhaps they would have stated an implied contract claim. However, in this case, the district court dismissed the Vaughns' claims for breach of contract and fiduciary duty at the close of their cases. The Vaughns should not be permitted to achieve by indirection what they have been precluded from doing directly.

3. Nondisclosures

The Vaughns also claim that various nondisclosures of allegedly material information constitute actionable fraud. In essence, they claim that the purported affirmative misrepresentations coupled with these omissions constitute actionable fraud. We disagree.

The Vaughns argue that General Foods should have revealed all of its contingent plans and the results of the various surveys that they had commissioned to the franchisees. The nondisclosure of these documents and plans purportedly misled the Vaughns as to the status of the System. The documents in question included the August 1978 study entitled "Project Beethoven," Plaintiffs' Ex. 941; the results of the 1975 Booz-Allen & Hamilton study which recommended implementation of a new policy for the System, Plaintiffs' Ex. 980; the recommendations prof-

fered by Goldman Sachs in 1978, Plaintiffs' Ex. 624; and the 1980 study performed by Salomon Brothers evaluating the advisability of selling the System, Plaintiffs' Ex. 791. According to the Vaughns, had they been privy to such information, they might not have made further investments in their franchises. Tr. 738. In response, General Foods submits that it was not under an affirmative duty to disclose all material facts to the Vaughns.

Under Indiana law, "the failure to disclose all material facts, by a party on whom the law imposes a duty to disclose, constitutes actionable fraud." *Grow v. Indiana Retired Teachers Community,* 149 Ind. App. 109, 271 N.E.2d 140, 145 (1971) (en banc); *see Indiana Bank & Trust Co. v. Perry,* 467 N.E.2d 428 (Ind. App. 1984) (omission is actionable where there is a duty to disclose). "As a matter of law, where there is no duty to speak or disclose facts, silence will not constitute actionable fraud." *Barnd v. Borst,* 431 N.E.2d 161, 168 (Ind. App. 1982). We do not believe that such a duty existed here.

As a preliminary matter, we note that neither party claims, at this stage of the litigation, that they were involved in a fiduciary relationship. The district court dismissed the Vaughns' breach of fiduciary duty claim finding that there was "no . . . evidence from which reasonable inferences can be drawn by which reasonable persons could find a fiduciary relationship between plaintiffs and defendants." Tr. 1193. The Vaughns correctly state that it is possible for a duty to disclose to exist in the absence of a fiduciary duty. However, for the duty to exist, it must be shown that "either one or each of the parties, in entering into the contract or other transaction expressly reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence . . . is necessarily implied." *Peoples Trust and Savings Bank v. Humphrey,* 451 N.E.2d 1104, 1112 (Ind. App. 1983) (quoting *McNair v. Public Sav. Ins. Co. of*

America, 163 N.E. 290, 293 (Ind. App. 1928)). However, not every relationship involving confidence and trust will support a duty to disclose. One Indiana court has stated that a duty to disclose may arise "where there is a blood, marital or fiduciary relationship." *Grow*, 271 N.E.2d at 143. The court also indicated that these relationships may arise "because of personal friendship and when one party knows that the other is relying upon him in such a manner. It is essential that there be a dominant and a subordinate party. . . ." *Id.* The record makes it clear that no such relationship existed between these parties. The relationship between the Vaughns and General Foods was an arms-length one. Over the course of their fourteen-year association with General Foods, the Vaughns were in a position to assess for themselves the viability of the System. As we noted, *supra*, the Vaughns received annual reviews of the profitability levels of their stores and were fully cognizant of the extent of their competition in the area. General Foods and Burger Chief constantly reassessed the course of their business; the Vaughns had an opportunity to do the same. Neither party was under an obligation to disclose its information-gathering or business analysis to the other. Each had to decide—and had an opportunity to decide—its future course.[4]

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[4]Count III of the Vaughns' amended complaint alleged, in addition to the Indiana common law fraud claim, a violation of the Illinois Franchise Disclosure Act, Ill. Ann. Stat. ch. 121-1/2 ¶ 701 *et seq.* Over objection, the district judge instructed the jury that:

> Under the Illinois Franchise Disclosure Act, it is unlawful for any person, in connection with the offer or sale of any franchise, directly or indirectly, to
>
> (a) Employ any device, scheme, or artifice to defraud;
>
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which

B. *Reliance*

The second element of a fraud claim is reasonable reliance on the part of the plaintiff on the material misrepresentations of the defendant. *Tutwiler*, 428 N.E.2d at 1296. Reliance has been deemed justifiable where all of the material facts were "exclusively within the knowledge of [the sellers], and the purchasers had no means of independently ascertaining the truth." *Whiteco Properties*, 467 N.E.2d at 437; *see Photovest Corp. v. Fotomat Corp.*,

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they are made, not misleading;

(c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

If you find from a consideration of all the evidence, that defendant Burger Chef Systems, and/or defendant General Foods Corporation did any of the aforementioned acts, then you must find the defendants liable under the Illinois Franchise Disclosure Act.

As defined in the statute, "sale" includes "every . . . disposition of a franchise or interest in a franchise for value."

The plaintiffs must prove, by a preponderance of the evidence, that the statements made by either Burger Chef Systems, Incorporated, or General Foods Corporation or both, if fraudulent, were a direct or immediate cause of plaintiffs' damages.

Tr. 1819-20.

General Foods argues on appeal that, even under the Illinois statute, the Vaughns' claim must fail. For the reasons set forth *supra* in the discussion of the Indiana common law fraud claim, we agree. We need not discuss the question whether the Vaughns' disposition of two franchises after 1979 falls within the ambit of the statute. Instead, we repeat our conclusion that the statements made by General Foods to the Vaughns were not fraudulent, and, therefore, they were not actionable. As the Vaughns themselves indicated in their "Reply to Defendants' Memorandum in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial," by reason of the entry of a general verdict, the claim for violation of the Illinois Act is subsumed in the general verdict of fraud. . . ." R. 326 at 40.

606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1981); *Plymale,* 419 N.E.2d at 762. The person claiming reliance upon a representation must exercise ordinary care in guarding against the fraud. *Carrell v. Ellingwood,* 423 N.E.2d 630, 635 (Ind. App. 1981). He cannot ignore what his own investigation has revealed and later claim that he was defrauded by the actions of the other party. *See Peterson Industries,* 584 F.2d at 168; *South v. Colip,* 436 N.E.2d 494 (Ind. App. 1982); *Plymale,* 419 N.E.2d 756.

The Vaughns correctly state that the fact of reliance is a jury question. *See Fleetwood Corp.,* 404 N.E.2d at 45. However, it is also important to remember that the *fact* of reliance is different from the *right* of reliance. Thus, to state a cause of action for fraud, a party must provide not only that he acted in reliance but also that he had the right to do so:

> Where the evidence is so clear as to be susceptible of only one reasonable inference, it is for the court to determine as a matter of law whether plaintiff was justified in relying on the representation and whether he was negligent in doing so. Generally, however, it is for the jury to determine as a question of fact whether on all the facts in evidence plaintiff was justified in relying on defendant's statements, whether the representations were of such a character and were made under such circumstances that they were likely to deceive plaintiff, whether plaintiff could by ordinary diligence have discovered their falsity, and whether plaintiff was negligent in relying on the representations and in failing to make an independent investigation of the facts.

37 C.J.S. *Fraud* § 129, at 455-56 (1955); *see Plymale,* 419 N.E.2d at 763 & n.6.

The Vaughns argue that they did, in fact, rely on the statements made to them by General Foods regarding advertising, investment, commitment and growth. They claim

that, in reliance on the assurances of the Company, they invested $6.3 million in their six restaurants over the course of fourteen years. The Vaughns assert that it was impossible for them to see through the misrepresentations made to them regarding the System. However, on this record, we must conclude that, although the Vaughns may in *fact* have relied on the representations of the defendants, they had no *right* to rely on them. Neither the nature of those representations nor the relationship of the parties permitted the Vaughns to rely on such material in making their independent decisions. Nor can the Vaughns successfully argue that the necessary information was within the exclusive control of the defendants. On this record, it is firmly established that the Vaughns cannot be characterized as unaware of the status of the System. They were constantly and continuously apprised of the status of their operation as well as the actual contributions and expenditures made by General Foods to the System.

C. *Damages*

The final element of an actionable fraud claim is injury. As a general proposition, damages in a fraud action must "be the natural and proximate consequence of the act complained of." *Smart & Perry Ford Sales, Inc.*, 274 N.E.2d at 725 (quoting *Linderman Machine Co. v. Hillenbrand Co.*, 127 N.E. 813, 815 (Ind. App. 1921)). Thus, the claimant's reliance on the alleged misrepresentations must be detrimental. *See Tutwiler*, 428 N.E.2d at 1297; *Fleetwood Corp.*, 404 N.E.2d 38. Benefit of the bargain damages are available in a fraud action only where the bargain is not what it was represented to be. *See Carl Call, Inc. v. B.P. Oil Corp.*, 554 F2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977). In the foregoing subsections, we have held that, as a matter of law, the appellants did not make factual misstatements upon which the Vaughns had a right to rely. It follows, therefore, that any loss which the Vaughns may have suffered was not the result of fraudulent conduct of the defendants.

However, even if we were to assume that the defendants had made such factual statements and that the Vaughns could have justifiably relied upon those statements, it would be difficult, on this record, to hold that the Vaughns had sustained their burden of proving that the alleged damages were caused by the defendants' conduct. We also note—although we find it unnecessary to reach the question—that it is not at all certain that the Vaughns could have, on this record, established, with a reasonable degree of certainty, the amount of damage attributable to the actions of the defendants. *See Whiteco Properties,* 467 N.E.2d at 438. While the amount of damage need not be determined with mathematical precision, it must be supported by the evidence in the record. *First National Bank of New Castle v. Acra,* 462 N.E.2d 1345, 1351 (Ind. App. 1984); *Colonial Discount Corp. v. Berkhardt,* 435 N.E.2d 65 (Ind. App. 1982); *Indiana Bell Telephone Co. v. O'Bryan,* 408 N.E.2d 178, 184 (Ind. App. 1980); *Friendship Farms Camps, Inc. v. Parson,* 172 Ind. App. 73, 359 N.E.2d 280 (1977). The award "may not be based upon mere conjecture, speculation, or guesswork." *Whiteco Properties,* 467 N.E.2d at 438 (citing *Stoneburner v. Fletcher,* 408 N.E.2d 545 (Ind. App. 1980)).

IV

RELEASES

The appellants also contend that the twenty-four mutual releases signed by the Vaughns constitute a bar to suit. We have already concluded that there was no fraud perpetrated on the Vaughns. However, as an alternate ground for our disposition of this case, we conclude that, as a matter of law, the mutual releases executed by the parties are a bar to this action.

The releases signed by the Vaughns provided:

> Except for payments arising in the ordinary course of business which are now due . . . each of us there-

> fore releases the other and any parent . . . corporations, from all claims and demands whatsoever, however, wherever, and whenever they may have arisen, down to date.

Plaintiffs' Ex. 4.

As a general proposition, Indiana has long recognized the "important policy of upholding releases in order to facilitate the orderly settlement of disputes." *Indiana Bell Telephone Co. v. Mygrant*, 471 N.E.2d 660, 664 (Ind. 1984); *Grimm v. F.D. Borkholder Co.*, 454 N.E.2d 84, 87 (Ind. App. 1983). While there appears to be an absence of Indiana authority directly on point, the enforceability of releases in the franchise context has been consistently upheld. *See Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Redel's Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099 (D. Minn. 1981), *aff'd* 685 F.2d 438 (8th Cir. 1982).

The Vaughns argue that these releases are unenforceable for three reasons: (1) there was a lack of consideration; (2) they were the product of economic duress; (3) they were induced by fraud. In our view, each of these contentions is without merit. It is clear that there was adequate consideration since each of the releases was given in exchange for making, renewing, extending or modifying the terms of franchise agreements. Moreover, the agreements were mutual. Each party released the other from claims which may have risen other than those "for payments arising in the ordinary course of business which are now due."

The claim of economic duress is likewise without merit as a matter of law. Indiana does not recognize economic duress as a defense. *Raymundo v. Hammond Clinic Association*, 449 N.E.2d 276, 282 (Ind. 1983). Moreover, the undisputed evidence of record demonstrates that the Vaughns continued their relationship with the defendants

as a result of their own business judgments. Indeed, the Vaughns have conceded that they were aware of their right to consult an attorney prior to signing the agreements containing the releases and stated that, on at least one occasion, an attorney was consulted prior to the signing of the agreement. Tr. 949-50. Indiana does recognize the general rule that "[f]raudulent inducement . . . can vitiate a release." *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983); *Raymundo*, 449 N.E.2d 276; *Indiana Steel & Wire Co. v. Studes*, 119 N.E. 2, 4 (Ind. 1918). However, to a large extent, the Vaughns' allegations in support of this defense are simply a replay of their general fraud allegations. We have already held that the record simply will not support these allegations. Moreover, as the Fifth Circuit noted in *Ingram*, "[p]arties bargaining at arms length who are not in a fiduciary relationship with one another are not required to make known all possible claims against one another." 698 F.2d at 1315.

CONCLUSION

Jury verdicts are not to be overturned lightly. Before taking such a step, a reviewing court must not only ascertain carefully the governing law but also review, with the utmost care, the record of trial. In undertaking this latter task, we must tread carefully. Fact-finding is the jury's role and the parties have a right to expect that, mindful of the guarantee of the seventh amendment, we shall not intrude upon that role and substitute our own judgment. Nevertheless, it is our function to determine, in the final analysis, whether the law and the evidence support the jury's verdict. Here, we must conclude that the verdict cannot stand. Since the district court should have granted the motion for JNOV, its judgment is reversed.

Reversed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT IN A CIVIL CASE
United States District Court
Northern Indiana

H82-621

AL VAUGHN, *et al.*
v.
GENERAL FOODS CORPORATION, *et al.*,
Michael S. Kanne

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of the plaintiffs AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION, and SPRINGFIELD DRIVE-INS, INC., and against the defendants GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC., in the amount of $4,800,000.00 for *actual* damages, and $9,200,000.00 for *punitive* damages.

RICHARD E. TIMMONS, CLERK
/s/ David Borkoski, Deputy Clerk
March 7, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAUSE NO. H 82-621

FILED
MAY 3, 1985

AL VAUGHN and MARJORIE VAUGHN, *et al*,
Plaintiffs,

v.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,
Defendants.

ORDER DENYING DEFENDANTS' POSTTRIAL MOTIONS

This matter is before the court on defendants' Motion for Judgment Notwithstanding the Verdict (JNOV) and, in the alternative, on the Motion for a New Trial filed on March 18, 1985. The court being duly advised, hereby denies said motions.

Defendants filed their motion for JNOV pursuant to FED. R. CIV. P. 50(b) alleging that the evidence, presented at trial, could only lead to the conclusion that defendant had committed no fraud; that even if defendants did commit fraud, plaintiffs were not damaged; that no award of punitive damages was justifiable; and that plaintiffs had voluntarily signed releases which forever barred their claims. Because the jury did not reach those conclusions but found that defendants willfully and maliciously defrauded plaintiffs to plaintiffs' substantial finan-

cial detriment, defendants argue the verdict should be reversed as a matter of law and judgment entered in their favor.

In the alternative, defendants contend that they are entitled to a new trial for the reason that the 14 million dollar verdict reached is grossly excessive and unjust. Moreover, defendants allege that this court incorrectly instructed the jury on several points of law and committed several evidentiary errors which prejudiced their case.

The allegations, as set forth in plaintiffs' complaint and condensed as much as possible for purposes of this ruling, are that General Foods purchased Burger Chef in 1968, in an attempt to diversify. The purchase provided Burger Chef with much needed capital, which both General Foods and Burger Chef hoped would cause Burger Chef to become one of the largest fast food hamburger chains in America. At the time General Foods acquired Burger Chef, Al and Marjorie Vaughn, plaintiffs in this case, owned several Burger Chef franchises.

Plaintiffs filed suit in 1982, alleging that General Foods and Burger Chef had fraudulently induced them to continue investing in Burger Chef franchises.

Plaintiffs alleged that General Foods publicly pronounced its financial and managerial support for the continuing operation of the Burger Chef System as a part of the General Foods family, while in fact, General Foods was secretly preparing to sell the Burger Chef System. Plaintiffs pointed to numerous representations and actions by both Burger Chef and General Foods which they allege caused them to believe that the Burger Chef System would remain viable and continue to expand with the financial support of General Foods.

In essence, plaintiffs claimed that both Burger Chef and General Foods had acted in a fraudulent manner, willfully concealing material facts which would, and did, influence

their decision to continue investing in the Burger Chef System. Moreover, the financial backing General Foods had promised franchisees, when it bought Burger Chef, was virtually nonexistent in spite of the fact that franchisees were asked to make improvements in their stores and invest their own resources in order to keep the Burger Chef System growing.

General Foods and Burger Chef allege that none of the representations made by them were fraudulent or were calculated to cause plaintiffs to rely upon them. Defendants also argued that plaintiffs signed various releases whereby plaintiffs agreed to hold neither General Foods nor Burger Chef liable for their actions. Defendants assert that those releases barred plaintiffs' claims.

Plaintiffs countered by stating that they signed the releases under duress. In other words, General Foods threatened to deny them certain advantages if they refused to sign the releases. Thus, they asserted they had no choice in signing the releases.

These issues were tried to a jury and the jury found for plaintiffs, awarding them 14 million dollars. Of the 14 million dollars awarded, 4.8 million constituted actual damages while 9.2 million constituted punitive damages. Thus, by their verdict, the jury thus found that defendants had acted in a fraudulent manner and that defendants' conduct was wanton and malicious. Also, the jury necessarily found that plaintiffs suffered damages and that the releases they signed did not bar their claims.

In their motion for JNOV, defendants contend that there is no evidence which could possibly support the jury's findings of fraud, malicious conduct, actual damages, or duress in signing releases. Thus, according to the defendants, the jury verdict is erroneous and should, as a matter of law, be reversed.

In seeking a JNOV, the moving party must meet a "demanding standard". *McKinley v. Trattles,* 732 F.2d

1320 (7th Cir. 1984). That standard, applied when federal courts have jurisdiction based on a federal question, is as follows:

> the motion [for JNOV] should be denied where the evidence, along with all the inferences to be reasonably drawn therefrom, when viewed in a light most favorable to the party opposing such motion, is that [people] in a fair and impartial exercise of their judgment may reach different conclusions.

Id. at 1323-1324, quoting *Colb v. Chrysler,* 661 F.2d 1137, 1140 (7th Cir. 1981), *Estate of Clyde Davis v. Johnson,* No. 83-2631 (7th Cir. Sept. 27, 1984).

However, where, as here, the court has jurisdiction based on diversity, the standard for determining when a JNOV should be granted or denied is to be determined by the law of the state in which the federal court sits; in this case, Indiana. *Robinson v. Lescrenier,* 721 F.2d 1101 (7th Cir. 1983), *Dr. Franklin Perkins School v. Freeman,* Nos. 82-2490, 83-1465, 83-1538, 83-1645 (7th Cir. Aug. 14, 1984), n.20.

In Indiana, the motion for JNOV has been abolished. Indiana Rule of Civil Procedure 50(e). In lieu thereof, the Indiana Rules of Civil Procedure allow a party to move for a verdict on the evidence and the court may enter judgment on the evidence either before or *after the jury is discharged* without directing the verdict. Thus, the motion for a verdict on the evidence after the jury has been discharged, is similar to the federal motions for JNOV.

The standard for determining whether judgment, contrary to the verdict, will be entered on the evidence, pursuant to Indiana rules, is similar to the federal standard for granting a JNOV which is set out above. The court, in considering a motion for judgment on the evidence, subsequent to the jury's verdict, must view "all the evi-

dence and reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party and the court may then enter judgment contrary to the jury verdict only where the evidence and inferences so viewed point unerringly to the conclusion not reached by the jury." *Huff v. Travelers Indemnity Co.*, 363 N.E.2d 985 (Ind. 1977). The court may not reweigh the evidence or judge the credibility of the witnesses. *Coffel v. Perry*, 452 N.E.2d 1066 (Ind. App. 1983).

This court has held that a trial court may not interfere with the function of a jury on a motion for JNOV. Thus, where there is evidence which permits more than one conclusion, the conclusion reached by the jury will not be disturbed. *Karczewski v. Ford Motor Co.*, 382 F.Supp. 1346, *aff'd*, 515 F.2d 511 (7th Cir. 1975).

Viewing the evidence and all inferences reasonably drawn therefrom, in a light most favorable to the plaintiffs in this case, it is apparent that a jury could have reached the verdict it did based on the evidence submitted at trial. The plaintiffs have given many examples of that type of evidence introduced at trial which supported their position and from which the jury could have reached the conclusion it did. (*See* plaintiffs' response to defendants' motion for JNOV.)

Plaintiffs presented evidence from which fraudulent concealment could reasonably be inferred and from which the jury could have reasonably determined that defendants acted willfully. Moreover, plaintiffs' expert witness presented evidence of actual damages. Coupled with the evidence of defendants' behavior, the jury could have reached the verdict it did. It cannot be said that the evidence so unerringly calls for the conclusion not reached by the jury, that a JNOV is appropriate.

As stated previously, there was sufficient evidence from which differing conclusions could be reached. The court

will not substitute its conclusions for that of the jury. Thus, defendants' motion for JNOV is hereby DENIED.

Defendants have also requested a new trial pursuant to FED. R. CIV. P. 59(a). The standard for granting or denying a motion for new trial is much less stringent than the standard for denying or granting a JNOV. Pursuant to FED. R. CIV. P. 59(a), a party may seek a new trial on any or all the issues "for any of the reasons for which new trials have heretofore been granted . . .". Granting a new trial is entirely discretionary with the court, *Allied Chemical Corp. v. Daislon,* 449 U.S. 33 (1980), and is governed by federal law and not state law. *General Foam Fabricators v. Tenneco Chemicals, Inc.,* 695 F.2d 281 (7th Cir. 1982).

A new trial may be granted where the verdict is against the weight of the evidence, where damages are excessive, or where for any reason, the trial was not fair. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940). Defendants contend that the jury verdict is excessive and was reached as a result of this court's erroneous jury instructions.

On a motion for new trial, the court has greater flexibility in reevaluating the evidence and the court may order a new trial even if there is some evidence to support the verdict. Upon a review of the evidence in this case the court cannot say that the verdict of the jury was monstrously excessive, nor can the court say that the verdict was reached as a result of prejudicial error.

In reaching its decision as to what damages plaintiffs incurred, the jury was entitled to consider all evidence, including testimony presented by plaintiffs' witnesses.

While this court may have reached a different result it will not substitute its valuation of the damages for that of the jury. The jury was entitled to rely on the testimony

of the plaintiffs' economist in evaluating the worth of plaintiffs' lost profits.

> Both Indiana and the Seventh Circuit allow the trial judge to set aside the jury's verdict only if it is grossly excessive . . . . We, [Court of Appeals] therefore would not set aside a jury's verdict as excessive *unless there was no rational connection between the evidence on damages and the verdict* - unless, in other words the verdict 'monstrously excessive.' *Quilter v. Elgin, Joliet & Eastern Railway,* 409 F.2d 338, 340 (7th Cir. 1969) . . . or in the equivolent formation of the Indiana courts' ' so excessive as to be flagrantly outrageous and extravagant'. *State v. Daley,* 287 N.E.2d 552 (Ind. App. 1972). (Emphasis added.)

Abernathy v. Superior Hardwoods, Ind., 704 F.2d 963 (7th Cir. 1983).

In *Abernathy,* a damage award was set aside as excessive, but only because the plaintiffs' counsel asked for an award within a range for which there was no justification. In this case, plaintiffs' counsel also suggested a range of potential lost profits but presented expert testimony which indicated that the range in question had a factual basis.

Another problem in *Abernathy,* not encountered here, is the fact that plaintiff attempted no computation of the "hourly pay multiplied by the number of hours that plaintiff could reasonably expect to work for the rest of his working life. Thus there was no factual basis for the jury's awarding lost earnings. *Id.* at 972. The type of computation sought by the court in *Abernathy,* was precisely the computation made by plaintiffs' economist in this case. Plaintiff's expert outlined precisely the method he used in arriving at the amount of damages. Thus, the jury verdict has a factual basis.

The verdict of 14 million dollars is not monstrously excessive in light of all the evidence presented. There is a

factual basis for the award and the jury could choose to believe the testimony of plaintiffs' expert witness in awarding damages to plaintaiffs. Therefore, the motion for a new trial on the basis of an excessive verdict is DENIED.

Turning now to defendants' claims that they were prejudiced by this court's jury instructions on various points of law and by certain of the court's evidentiary rulings, the court determines none of the errors alleged are so prejudicial that they warrant a new trial.

According to defendants, Final Instruction 28, paragraph 4, instructs the jury that they could find that defendants knowingly made false statements of fact when defendants were merely expressing an opinion. Such a finding is contrary to Indiana law.

However, this court feels that subparagraph 4 of Instruction 28 is warranted where a party expresses an opinion *as if it were a fact.* In such a situation, the distinction between mere puffery, or opinion, and fact is nonexistent and the party who relies on the "opinion" is in fact, relying on a misrepresented fact.

In *Whiteco Properties, Inc. v. Thielbar,* 467 N.E.2d 433 (Ind. App. 3rd Dist. 1984), the court noted first, that, as in this case, the defendant attempted to characterize "its representations to the parties as mere opinion, on which they had no right to rely." The court agreed that actionable fraud could not be based on mere opinion but went on to state:

> The distinction between fact and opinion has long been regarded by keen analysts as a logical absurdity. (Citations omitted). The opinion rule serves to deny relief to persons who unjustifiably rely on a seller's 'puff' or 'trade talk'.

Id. at 437. The court then cited an example. Where a salesman states that his product is "as good as new" or "the best buy" he makes a subjective statement of opinion

on which no reasonable purchaser could rely. But where he states "my product is guaranteed to be free of defects" he makes an objective statement of fact. *Id.* at 437.

Final Instruction 28 instructs the jury that if an opinion is stated in terms of absolute facts which are known to be untrue, that "opinion" becomes an objective statement of fact. It should be noted that Final Instruction 29 clearly instructed the jury that *mere* expression of opinion does not constitute actionable fraud. Moreover, Final Instruction 28 contains several definitions of fraudulent statements and paragraph 4 should be read in conjunction with those other definitions as well as Final Instruction 29. The court now finds that the jury was not erroneously instructed and that any ambiguities in paragraph 4 of Final Instruction 28 were cleared up in Final Instruction 29. Thus, defendants were not prejudiced and the giving of Final Instruction 28 should not result in a new trial.

Defendants also complain about Final Instruction 35A which states that concealment becomes fraudulent where there is a duty to disclose material facts. That duty may arise where one party reposes a trust and confidence in the other. Evidence of the parties' relative position to each other, and their past course of dealing may give rise to the implication that such a trust existed.

Defendants initially argued that a duty to disclose arises only where there is a fiduciary relationship between the parties. Final Instruction 35A however, allows the jury to find that defendants owed plaintiffs a duty to disclose, not because of a fiduciary relationship, but, because of their past course of dealing and relative positions.

The language of Final Instruction 35A comes from the case of *McNair v. Public Saving Insurance Company of America,* 88 Ind. App. 386, 163 N.E. 290 (1928). That case was adopted in *Peoples Trust & Savings Bank v. Humphrey,* 451 N.E.2d 1104 (Ind. App. 1st Dis. 1983). To the extent that Final Instruction 35A quotes Indiana case-

law, the court now finds that final Instruction 35A was properly given and that defendants were not prejudiced.

Defendant also contends that Final Instruction 36 should not have been given, apparently because a violation of the Illinois Franchise Disclosure Act requires an "offer or sale or disposition" of a franchise. Defendants contend that there is no evidence of an offer, sale or disposition. Plaintiffs did however submit evidence that two of their franchises were terminated and that the entire system was sold. To that extent the jury could have inferred that a disposition occurred. Further, as plaintiffs pointed out in their response to defendants' motion for JNOV, "by reason of entry of a general verdict, the claim for violation of the Illinois Act is subsumed in a general verdict of fraud, and General Foods has not demonstrated any prejudicial error."

Defendants also contend that Final Instruction 60 should not have been given because there was no evidence of fraudulent concealment. The court specifically found that there was sufficient evidence go give that instruction and now finds that no error was committed in giving that instruction.

Defendants contend Final Instruction 21 was misleading because it emphasized one of the elements listed in Final Instruction 20. Defendants do admit that Final Instruction 20 is a correct statement of the law. The court now finds that no "plain error" was committed in giving Final Instruction 21 since it must be read in conjunction with Final Instruction 20 and all the other instructions in general.

Finally, the court finds that defendants' claims that they were prejudiced by the admission of evidence relating to General Foods' gross sales and assets and the evidentiary rulings by the court with regard to impeachment of Mr. Vaughn, use of Norman Ring as an expert witness, and references to the Ogilvy & Mather report, are without merit and do not call for a new trial.

IT IS THEREFORE ORDERED that defendants' motion for JNOV pursuant to FED. R. CIV. P. 50(b) or in the alternative for a new trial pursuant to FED. R. CIV. P. 59(a) is hereby DENIED.

ENTER: May 3, 1985.

/s/Michael S. Kanne
Michael S. Kanne, Judge
United States District Court

APPENDIX D

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 29, 1986.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. 82 C 621
MICHAEL S. KANNE, Judge

No. 85-1847

AL VAUGHN, *et al.*,

Plaintiffs-Appellees,

vs.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Defendants-Appellants.

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX E

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 9, 1986.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. H 82-621.
MICHAEL S. KANNE, Judge

No. 85-1847

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION and SPRINGFIELD DRIVE-INS, INC.,

Plaintiffs-Appellees,

vs.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Defendants-Appellants.

ORDER

Plaintiffs-appellees filed a petition for rehearing and suggestion for rehearing en banc on August 12, 1986. No judge in the regular service has requested a vote on the suggestion of rehearing en banc and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

No. 86-912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION and SPRINGFIELD DRIVE-INS, INC.,

Petitioners,

-against-

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. KIRBY, JR.
THOMAS G. GALLATIN, JR.
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000

Counsel for Respondents
General Foods Corporation
and Burger Chef Systems, Inc.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

This lawsuit was brought by a fast food restaurant franchisee (petitioners herein) claiming lost profits in the conduct of the franchised business. The lawsuit asserted the failure to provide a "viable and competitive" franchise system over the ten years for which damages were claimed. The defendants (respondents herein) were the franchisor, Burger Chef Systems, Inc., and Burger Chef's former corporate parent, General Foods Corporation.

At the conclusion of petitioners' case, the district court properly found that the franchise agreement was fulfilled in every respect and dismissed petitioners' breach of contract claim. The district court also properly found that the franchise agreement was the only legal relationship between the parties and dismissed a claim alleging breach of fiduciary duty. A catch–all state fraud claim was allowed to go to the jury. The jury returned a verdict in favor of petitioners for $4.8 million in extra profits allegedly lost by petitioners during the ten–year period of the alleged fraud and $9.2 million in punitive damages.

After reviewing the governing law and the trial record "with utmost care," 797 F.2d at 1417, and considering "only the evidence favorable to [petitioners] and the reasonable inference to be drawn from that evidence," *Id.* at 1410, the Court of Appeals for the Seventh Circuit unanimously concluded that the fraud verdict was not supported by the evidence and could not stand under state law. The Court of Appeals found that none of the essential elements of a fraud claim had been established — i.e. there were no actionable misrepresentations, no justifiable reliance, and no damages related to the alleged fraud. The Court also held as a further basis for its decision that the twenty–four general releases executed by the parties at different times throughout their relationship barred this action as a matter of state law.

In view of the factual record of this case, and the alternate bases for the judgment below, the questions sought to be presented by petitioners should be restated:

1. Whether it was error for the Seventh Circuit Court of Appeals to reverse the district court's denial of respondents' motion for judgment notwithstanding the verdict when, after a careful review of the entire record and consideration of the applicable state law, the court concluded that "there is no substantial evidence or reasonable inference to be adduced therefrom to support [any] essential element of the claim, i.e., the evidence [points] unerringly to a conclusion not reached by the jury."

2. Whether it was error for the Seventh Circuit Court of Appeals to conclude that, as a matter of state law, the twenty–four general releases executed by the parties provide an alternative and independent ground to upset the jury verdict.

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

APPENDIX

TABLE OF AUTHORITIES

TABLE OF CONTENTS, Continued

APPENDIX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
NO. 86–912

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION
and SPRINGFIELD DRIVE–INS, INC.,

Petitioners,

–against–

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, General Foods Corporation ("General Foods") and Burger Chef Systems, Inc. ("Burger Chef"),[1]

---

1. Pursuant to Rule 28.1 of this Court's rules, respondents state that General Foods Corporation is a wholly–owned subsidiary of Philip Morris Corporation and that Burger Chef Systems, Inc. is a wholly–owned subsidiary of Hardees' Food Systems, Inc. which in turn is a wholly–owned subsidiary of

submit this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit of Petitioners Al Vaughn, Marjorie Vaughn, Algon Corporation and Springfield Drive–Ins, Inc. (collectively "Vaughns").

COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case repeatedly misstates the record evidence and the opinion of the Court of Appeals for the Seventh Circuit. This Court is respectfully referred to the opinion of the Court of Appeals for an accurate statement of the case. 797 F.2d 1403 (7th Cir. 1986)(reproduced as appendix A to the Vaughn's petition). Following the Court of Appeals' decision, petitioners moved for a rehearing and suggested a rehearing *en banc*. This motion was denied on September 9, 1986 after no judge in the regular service of the Seventh Circuit requested a vote on the suggestion of rehearing *en banc* and all the judges on the panel hearing the appeal voted to deny rehearing. *See* Petitioners' appendix E. Petitioners then moved for a stay of the issuance of the mandate pending appeal to this Court. This motion was denied on September 24, 1986, with the Court of Appeals observing:

> The issues which the appellees propose to present to the Supreme Court of the United States in their petition for certiorari were thoroughly considered by the panel in its deliberations on this case. Moreover, these issues are very fact–specific and dependent on questions of state law. Since there is no reasonable probability that the Supreme Court will grant certiorari and even less of a possibility that, if certiorari were granted, further review would result in reversal, the motion for stay of mandate pending application for a writ of certiorari is DENIED.

Respondents' appendix A.

REASONS TO DENY THE WRIT

This appeal raises no "special or important" issues, a prerequisite for the grant of a petition for a writ of certiorari. Although petitioners attempt to cloak their argument in the Seventh Amendment and raise an alleged conflict between the standards for granting a judgment notwithstanding a verdict under federal and state law, there are no substantial federal issues presented in this case. The Court of Appeals was explicitly aware of its limited role in reviewing jury verdicts in light of the Seventh Amendment, 797 F.2d at 1417, and the petitioners ultimately do not substantively dispute the standard applied by the Court of Appeals in conducting its limited review in light of the fact that the stringent state standard applied here is virtually identical to the federal standard for which they now argue.

In the final analysis, the petitioners seek to have this Court: 1) render an advisory opinion as to which of two virtually identical legal standards for a judgment N.O.V. applies; 2) embark on a review of an extensive trial record to determine if evidence the Court of Appeals was unable to find supports the *prima facie* elements of common law fraud under state law; and, finally, 3) review the Seventh Circuit's interpretation of state law in light of the factual record. Petitioners' attempt to enmesh this Court in any of these three exercises is wholly inappropriate. *See generally The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."), *cited with approval in Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *Butner v. United States*, 440 U.S. 48, 57–58 (1979) ("We decline to review the state–law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.").

A. THE ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT, BASED ON STATE LAW AND THE FACTUAL RECORD IN THIS CASE, DOES NOT PRESENT A CONSTITUTIONAL QUESTION FOR THIS COURT TO DECIDE.

A court may grant judgment notwithstanding the verdict when a jury's verdict is not supported by the law. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1966) ("[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial."); *Powell v. J.T. Posey Co.*, 766 F.2d 131, 135 (3d Cir. 1985) (because evidence presented at trial was insufficient as a matter of law, district court in diversity action should have granted motion for judgment notwithstanding the verdict).

Petitioners cite this Court's opinion in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), in support of the undisputed proposition that the Seventh Amendment places substantial limitations on an appellate court's power to review a jury verdict. However, while restrictions are indeed placed upon a reviewing court, the very case cited by petitioners and a long line of this Court's decisions have held that an appellate court has not only the power, but the obligation, to review the record and determine whether the evidence is sufficient to support the jury's verdict under the applicable law. *See, e.g., Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2511 (1986) (verdict must be directed if, under the governing law, there can be but one reasonable conclusion as to the verdict)(citing *Brady v. Southern Ry.*, 320 U.S. 476, 479–480 (1943)).

In their attempt to seize the attention of this Court, petitioners have mischaracterized the Court of Appeals' review of the record below as a usurpation of the jury's role. Petition at 13. The Court of Appeals determined whether there was a submissible issue for the jury with a careful eye to the Seventh

Amendment. In directing entry of judgment for respondents, the Court of Appeals stated:

> Jury verdicts are not to be overturned lightly. Before taking such a step, a reviewing court must not only ascertain carefully the governing law but also review, with the utmost care, the record of trial. In undertaking this latter task, we must tread carefully. Fact–finding is the jury's role and the parties have a right to expect that, mindful of the guarantee of the seventh amendment, we shall not intrude upon that role and substitute our own judgment. Nevertheless, it is our function to determine, in the final analysis, whether the law and the evidence support the jury's verdict. Here, we must conclude that the verdict cannot stand.

797 F.2d at 1417.

The Court of Appeals concluded that, as a matter of law, the statements made by General Foods and Burger Chef to Burger Chef franchisees could not constitute actionable fraud under state law. The Court of Appeals correctly set forth the law of fraud in Indiana, as interpreted by the Indiana state courts as well as by the Seventh Circuit, and concluded that the petitioners had failed to establish the requisite elements of a state fraud claim. This is not a case where the lower court has resolved issues of fact or credibility against petitioners or has disregarded the law of the state in which it sits. The court applied the law of Indiana to what, on appeal, was essentially an undisputed record, with all inferences drawn in favor of petitioners. It is this application of state law to the facts most favorable to petitioners which the petitioners ultimately seek to put before this Court.[2] The Court of Appeals correctly

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2. The deference to the record most favorable to petitioners has not stopped them either in this Court or the Court of Appeals from misstating that record. An example of Petitioners' misstatement of the record is their

determined that petitioners' legal arguments on this record as to whether there was actionable fraud under state law were lacking in merit. The factual record and analysis of the law is set out at length in its opinion. It is now inappropriate to seek further factual review or review in this Court of the state law issues which have been given extensive attention by the Court of Appeals. *See United States v. Johnston, supra*; *Butner v. United States, supra.*

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repeated allegation of an alleged "target date" for the sale of Burger Chef. There is not one shred of evidence in the record to support the fantastic proposition that in 1971 General Foods made a decision to "target" 1981 as the year to sell its Burger Chef subsidiary and then systematically and intentionally destroyed its subsidiary over that ten–year period. Petitioners' first reference to the mythical target date can be found in the third paragraph of page four of their petition. Of the five references cited in support of the alleged "target date" for sale, three are totally irrelevant (E18, B11, B234), and two, which merely discuss a sale as one among several business options, never mention a planned sale of the system targeted for 1981 (E102, PX633).

In the second paragraph of page seven, petitioners cite E58 in support of their unfounded contention that in September of 1978 General Foods "reconfirmed" the end of 1981 as the target date for the sale of Burger Chef. Not only does the Finance Committee Report cited not support a 1981 date, or any other "target date" for sale, it refers to a two phase strategic growth plan, the second phase to end in fiscal 1983–two years after petitioners' contrived 1981 target date. Subsequent references made by petitioners to a ten–year target date appear on pages nine and eleven without record citation.

B. NO ISSUE CONCERNING THE APPROPRIATE STANDARD OF REVIEW FOR A JUDGMENT NOTWITHSTANDING THE VERDICT IS PRESENTED BY THIS CASE. THE COURT OF APPEALS' CONCLUSION THAT, AS A MATTER OF LAW, THERE WAS INSUFFICIENT EVIDENCE TO CREATE AN ISSUE OF FACT FOR THE JURY IS SUPPORTED BY BOTH THE STATE STANDARD APPLIED BY THE COURT OF APPEALS AND THE VIRTUALLY IDENTICAL FEDERAL STANDARD FOR WHICH PETITIONERS NOW ARGUE.

In their statement of questions presented for review, petitioners assert that this case raises an issue concerning the appropriate standard of review appellate courts should utilize when reviewing the propriety of a judgment N.O.V. Petitioners allude to a conflict in the circuits in their statement of this issue but then address this alleged conflict only in a footnote stating that there is a difference among the circuits as to whether a state standard or a federal standard should be applied in diversity cases for granting a judgment N.O.V. Petition at 18 n.6. Even if such a conflict existed, petitioners' muted argument on this issue is understandable because the Indiana state standard utilized by the Court of Appeals in this case and the federal standard are virtually identical. Hence, on the facts of this case, there is no genuine conflict for this Court to address.[3]

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3. Petitioners state the federal standard for grant or denial of a motion for judgment notwithstanding the verdict as: "whether there is evidence upon which the jury could properly find a verdict for that party. The sufficiency of the evidence supporting a jury verdict is a question of law which the court determines." Petition at 14 (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971)). This federal standard implemented by the Seventh Circuit when its jurisdiction is based on a federal question has been more completely stated as follows:

> [t]he motion [for JNOV] should be denied where the evidence, along with all the inferences to be reasonably drawn therefrom, when viewed in a light most favorable to the party

Petitioners are in reality seeking an advisory declaration of whether federal or state standards apply and a further factual review in this Court under what, in either event, will be the same standard applied below. Such a request for what amounts to nothing more than a further factual review by this Court is inappropriate. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."), *cited with approval in Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

Petitioners' argument is also squarely at odds with the position they took below. In their brief to the Seventh Circuit they urged the Indiana state standard on the court. In their

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> opposing such motion, is such that [people] in a fair and impartial exercise of their judgment may reach different conclusions.

McKinley v. Trattles, 732 F.2d 1320, 1323–1324 (7th Cir. 1984)(quoting *Kolb v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981)).

The Indiana standard utilized by the Seventh Circuit in this diversity case is fully in accord with the federal standard. The standard utilized by the Seventh Circuit in this case was stated as follows:

> The motion for a post–verdict judgment on the evidence must be granted where the verdict is not supported by sufficient evidence. In deciding the motion, the trial court must "view only the evidence favorable to the non–moving party and the reasonable inferences to be drawn from that evidence." *Huff v. Travelers Indemnity Co.*, 266 Ind. 414, 363 N.E.2d 985, 990 (1977). Accordingly, the "trial court may enter judgment only *if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim*, i.e., the evidence must point unerringly to a conclusion not reached by the jury." *Id.* (citation omitted and emphasis in original).

797 F.2d at 1410.

Petition For Rehearing And Suggestion For Rehearing *In Banc*, petitioners again urged the Indiana standard:

> Because this is a diversity case, the standard which governs the review of the district court's denial of defendant's motion for JNOV is found in state law. In this instance, Indiana law governs. The Indiana standard for granting such motion is "extremely high." Indiana R.Civ.P.50; *Haugh v. Jones & Laughlin Steel Corp.*, 101 F.R.D. 88, 91 (N.D. Ind. 1984).

Respondents' appendix B. This petition for a writ of certiorari, arguing the impropriety of applying the Indiana standard, is not only inappropriate, but disingenuous. The writ should be denied for this reason alone. *Cf. Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question was not raised in Court of Appeals and is not properly before us"). *See generally Robinson v. Lescrenier*, 721 F.2d 1101, 1103 n.1. (7th Cir. 1983) ("Because the parties in this case did not dispute that state law governed with respect to the standard for review of a motion for judgment n.o.v., and because we find evidence in the record to meet either the federal or state standard, we are unwilling to reach the issue of whether the federal or state rule should apply . . . .").[4]

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4. Petitioners' also suggest in a footnote that this Court should seize upon this case as an opportunity to announce that the standard for deciding a motion for judgment N.O.V. should not be the same for the trial court and the appellate court. Petition at 19 n.8. This issue was never presented below, and it has been essentially resolved by this Court in any event. In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1966), the question was whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment N.O.V., may itself order dismissal or direct entry of judgment for defendant. This Court held: "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment N.O.V. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment N.O.V." *Neely*, 386 U.S. at 322. *See also Powell v. J.T.*

C. THE TWENTY-FOUR MUTUAL RELEASES FOUND TO BE VALID BY THE COURT OF APPEALS CONSTITUTE AN ALTERNATIVE BASIS FOR THE DECISION BELOW AND FORECLOSE A REVIEW OF THE ISSUES SOUGHT TO BE PRESENTED BY PETITIONERS.

In their attempt to find an issue to put before this Court, petitioners have largely disregarded the dispositive alternative basis on which the Court of Appeals reversed the judgment below. The Court of Appeals held: "[A]s an alternate ground for our disposition of this case, we conclude that, as a matter of law, the mutual releases executed by the parties are a bar to this action." 797 F.2d at 1416. This alternative basis for the Court of Appeals' reversal is dispositive of petitioners' case and should also preclude further review by this Court.

Beginning in 1971 and ending in 1981, petitioners and respondents executed twenty–four separate written agreements in which petitioners fully released all claims against respondents. The generally recognized policy favoring the enforceability of releases has time and again led to summary disposition of claims brought by franchisees who had previously executed releases with their franchisors. *See Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Redel's Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888 (7th Cir.), *cert. denied*, 384 U.S. 939 (1966).

In this case, petitioners relied on their amorphous allegations of a ten–year fraud, in which respondents allegedly misrepresented their commitment to and the viability of the

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Posey Co., 766 F.2d 131, 134 (3d Cir. 1985) ("On appeal, the appellate court should apply the same standard as the trial court in determining the propriety of a judgment n.o.v."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971) (standard for passing on the sufficiency of the evidence is the same in the trial court and on appeal).

franchise system, as a basis to invalidate the releases executed over that period. The law is clear, however, that such general allegations of an underlying fraud will not invalidate a general release of all claims. In order to avoid the releases on the basis of fraudulent inducement, petitioners must have adduced proof of fraudulent conduct which proximately caused them to sign the releases. For example, in entering summary judgment for the defendant based on a release despite plaintiffs' claim of fraudulent inducement, the court in *Schmitt–Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099 (D. Minn. 1981), *aff'd mem.*, 685 F.2d 438 (8th Cir. 1982) stated:

> The Court finds that the plaintiffs have failed to establish that the defendant's alleged acts, even if taken as true, caused the plaintiffs to sign the release. Assuming as plaintiffs claim that the defendant misrepresented relocation costs and the projected profitability of the new location, threatened termination or non–renewal of the franchise agreement, and shipped the dealership unpopular vehicles, the plaintiffs have failed to show how these acts caused them to sign the release. The defendant's acts may have caused the plaintiffs to move to a new location but they did not directly cause the plaintiffs to sign the release. . . . The plaintiffs do not claim they were misled about the nature of what they were signing but merely that they did not fully understand its implications, which is at most a claim of unilateral mistake not of fraud. . . .

Id. at 1104. *See also Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1306, 1313–15 (5th Cir. 1983). Petitioners' burden of establishing fraudulent misrepresentations inducing the execution and hence the separate invalidity of each of the twenty–four releases executed at various times over a ten–year period would, of course, have been monumental. Petitioners made no attempt to satisfy that burden, and there is

consequently not one shred of evidence in the record that petitioners were fraudulently caused to sign the releases so as to vitiate their dispositive effect.

Because the Court of Appeals found that a *prima facie* case was not made out with respect to any of the elements of the underlying fraud relied upon by petitioners to invalidate the releases, it did not address the question of whether such a fraud could have invalidated the releases absent further proof of fraud in the execution of the releases themselves. It is respectfully submitted, however, that the indisputable absence of such further proof renders the releases unassailable as an independent basis on which to uphold the judgment below.

A writ of certiorari would bring before this Court, therefore, not only the fuli factual record on which the Court of Appeals found that there had been a failure of proof on the underlying fraud, but also the dispositive effect of the releases under state law. *See Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit"); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or Court of Appeals"). Where, as here, there is an essentially undisputed dispositive basis on which to affirm the judgment below, petitioners' attempt to raise other issues concerning the adequacy of proof of the underlying fraud, which need never be reached, is inappropriate. *See generally Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of Al Vaughn, Marjorie Vaughn, Algon Corporation and Springfield Drive-Ins, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Dated: January 8, 1986

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 24, 1986

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. _____

Hon. _____

AL VAUGHN, et al.,
Plaintiffs–Appellees,

v.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,
Defendants–Appellants.

No. 85–1847

Appeal from the United States District Court for the Northern District of Indiana
Hammond Division
No. 82 C 621
Judge Michael S. Kanne

This matter comes before the court for its consideration of the "MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI" filed herein on September 17, 1986, by counsel for the plaintiffs–appellees.

The issues which the appellees propose to present to the Supreme Court of the United States in their petition for certiorari were thoroughly considered by the panel in its deliberations on this case. Moreover, these issues are very fact–specific and dependent on questions of state law. Since there is no reasonable probability that the Supreme Court will grant certiorari and even less of a possibility that, if certiorari were granted, further review would result in reversal, the motion for stay of mandate pending application for a writ of certiorari is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85–1847

Al Vaughn, Marjorie Vaughn,
Algon Corporation and
Springfield Drive–Ins, Inc.,

Plaintiffs–Appellees,

v.

General Foods Corporation and
Burger Chef Systems, Inc.,

Defendants–Appellants.

PLAINTIFFS–APPELLEES'
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August 11, 1986

ARGUMENT

I. The Panel's Review Of The Evidence On An Appeal Of A JNOV Is In Conflict With Prior Opinions Of This Circuit And Effectively Negates Plaintiffs' Right To A Jury Trial.

There are many decisions of the Seventh Circuit which uphold jury verdicts in the face of motions for new trials or motions for judgments notwithstanding the verdict ("JNOV"). *See In Re Innovative Construction Systems, Inc.*, 230 U.S.P.Q. 94, 98 (7th Cir. 1986) (on appeal, deference owed to jury); *Dickerson v. Amax Inc.*, 739 F.2d 270 274 (7th Cir. 1984) (jury function to sift evidence and assess credibility). These opinions are founded on the deference our judicial system pays to the Seventh Amendment right to trial by jury. Even a cursory examination of the panel opinion in this case indicates that the panel has usurped the role of the jury, in contradiction to the Seventh Circuit cases cited above.

Because this is a diversity case, the standard which governs the review of the district court's denial of defendants' motion for a JNOV is found in state law. In this instance, Indiana law governs. The Indiana standard for granting such a motion is "extremely high." Indiana R. Civ. P. 50; *Haugh v. Jones & Laughlin Steel Corp.*, 101 F.R.D. 88, 91 (N.D. Ind. 1984).

The appellate court must look to see whether there is

> "evidence of probative value to support each essential element of the claim. If there is relevant evidence to support the claim, but the evidence conflicts, the verdict is not clearly erroneous, and judgment on the evidence notwithstanding the verdict is improper."

Dickerson v. Amax Inc., 739 F.2d 270, 273, *quoting Elsperman v. Pump*, 446 N.E.2d 1027, 1030 (Ind. App. 1983). The

reviewing court is to view "'only the evidence most favorable to the verdict together with all favorable inferences flowing therefrom.'" *Dickerson*, 739 F.2d at 273, quoting *Long v. Johnson*, 177 Ind. App. 663, 669, 381 N.E. 2d 93, 98 (1978). The appellate court is not to weigh the evidence nor resolve questions of credibility. *Id.*

Thus, in *Dickerson*, even though the Seventh Circuit found that the evidence was "in sharp conflict," it deferred to the jury's resolution of the conflict. "It is uniquely the function of the jury to sift through the evidence adduced at trial and assess the credibility of witnesses." 739 F.2d at 274. Similarly, the district court in *Karczewski v. Ford Motor Co.*, 382 F. Supp. 1346, *affirmed without opinion*, 515 F.2d 511 (7th Cir. 1975), said

> Motions for directed verdict or for judgment N.O.V. are proper only when there is *a complete absence* of any evidence to warrant submission to a jury . . . . The fundamental idea in [the various expressions of the general standard] compels a Federal district trial judge to exercise the greatest self–restraint in interfering with the constitutionally mandated processes of jury decision. The message is to do so only in the clearest of cases

382 F. Supp. at 1348 (emphasis added).

That *Vaughn* is not the "clearest of cases" is shown in several respects. First, the trial judge, the "thirteenth juror," found that plaintiffs had given "many examples," in their opposition to the defendants' JNOV motion, of evidence from which the jury could have reached its conclusion. Order Denying Defendants' Post–trial Motions, May 3, 1985.[1] Second, although stating it has reviewed the record, the appellate panel has not shown any

1. On appeal, there is no claim of error in the jury instructions and apparently the panel found none.

indication of having reviewed the evidence upon which the Vaughns rely. This can be demonstrated by an examination of two areas — fraudulent representations and a duty to disclose.

* * *